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Rule 10b-5: Protection for an Amorphous Class

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Comments

RULE 10b-5: PROTECTION FOR AN AMORPHOUS CLASS

INTRODUCTION

As a result of the need for nationwide regulation of the securities market, Congress enacted the Securities Act of 1933[1] and the Securities Exchange Act of 1934.[2] To curtail the presence of fraud in connection with securities transactions, Section 10(b)[3] was incorporated into the Securities Exchange Act and Rule 10b-5[4] was promulgated thereunder in 1942. Basically, the rule prohibits the

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1. 15 U.S.C. §§ 77a-aa (1970).
2. *Id.* §§ 78a-hh (1970).
3. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
   (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

4. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
   (a) to employ any device, scheme, or artifice to defraud,
   (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or
   (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1970) [hereinafter cited as Rule 10b-5].

use of any instrumentality of interstate commerce to practice fraud, in its most liberal interpretation,[5] upon any person in connection with the purchase or sale of any security. Four years after the promulgation of Rule 10b-5, the Rule was interpreted as providing a private remedy to persons injured by virtue of its violation.[6] Recognizing a civil cause of action, the courts were then faced with the question of who had the right to sue under Rule 10b-5. Although the common law fraud concepts of materiality,[7] privity,[8] reliance,[9] and causation[10] have been used with varying degrees of finality[11] to delimit the class of persons entitled to sue

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5. [We do not] think it sound to dismiss a complaint merely because the alleged scheme does not involve the type of fraud that is 'usually associated with the sale or purchase of securities.' We believe that § 10(b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.

A.T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (2d Cir. 1967).

6. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946), in which the plaintiffs alleged that they were induced to sell securities they had owned for less than the true market value as a result of the defendant's fraud. The court, basing its decision on Section 286 of the *Restatement of Torts*, held,

> The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if; (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest is one which the enactment is intended to protect.

-*Id.* at 513. This interpretation has been upheld in all of the federal circuits and recognized by the United States Supreme Court. *See, e.g.*, Superintendent of Ins. v. Bankers Life and Cas. Co., 404 U.S. 6, 13 n.9 (1971); Kuehnert v. Texstar Corp., 412 F.2d 700 (5th Cir. 1969); Jordon Bldg. Corp. v. Doyle, O'Connor & Co., 401 F.2d 47 (7th Cir. 1968); Doelle v. Ireco Chemicals, 391 F.2d 6 (10th Cir. 1968); Elks v. Carter, 291 F.2d 270 (9th Cir. 1961); Matheson v. Armbrust, 284 F.2d 670 (9th Cir.), *cert. denied*, 365 U.S. 870 (1960).

7. *E.g.*, List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965); Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963); James Blackstone Memorial Library Ass'n v. Gulf, M. & O. R.R., 264 F.2d 447 (7th Cir.), *cert. denied*, 361 U.S. 815 (1959).

8. *E.g.*, Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953); Joseph v. Farnsworth Radio & Television Corp., 99 F. Supp. 701 (S.D.N.Y. 1951), *aff'd*, 198 F.2d 883 (2d Cir. 1952).

9. *E.g.*, Rogen v. Ilikan Corp., 361 F.2d 260, 266-68 (1st Cir. 1966); List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965).

10. *E.g.*, List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965); Globus, Inc. v. Jaroff, 266 F. Supp. 524, 529-30 (S.D.N.Y. 1967); Barnett v. Anaconda Co., 238 F. Supp. 766 (S.D.N.Y. 1965).

11. Privity has been generally repudiated as a requirement. *E.g.*, Jefferies & Co. Inc. v. Arkus-Duntov, 360 F. Supp. 1206, 1213 (S.D.N.Y. 1973); Green v. Janhop, 358 F. Supp. 413 (D. Ore. 1973); Cochran v. Channing, 211 F. Supp. 239 (S.D.N.Y. 1962); Brown v. Bullock, 194 F. Supp. 207 (S.D.N.Y. 1961); Texas Continental Life Ins. Co. v. Bankers Bond Co., 187 F. Supp. 14 (W.D. Ky. 1960). Reliance has also been held as not a prerequisite in an action under Rule 10b-5. *E.g.*, Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970), *cert. denied*, 398 U.S. 950 (1971); Hanly v. Securities & Exchange Com., 415 F.2d 589 (2d Cir. 1969); Vine v. Beneficial Finance Co., 374 F.2d

under the Rule, the requirement that has clung tenaciously to limit access to federal courts is the purchaser-seller requirement.[12] It was first enunciated in *Birnbaum v. Newport Steel Corp.*,[13] and is quite frequently referred to as the *Birnbaum* doctrine.[14] Stated simply, in order to sue under Rule 10b-5 the plaintiff must be either a purchaser or seller of securities.

It should be noted at the outset however, that the legal concept, with regard to Rule 10b-5, of who is deemed to be a purchaser or seller is far different from the lay concept or even the concept of those terms as used in other sections of the federal securities legislation.[15] Persons who hold securities at the time of trial, but must sell or exchange them later because of practical considerations have been held to meet the purchaser-seller requirement as "forced sellers."[16] Moreover, individuals prevented from consumating a stock purchase for which they have contracted have been held to meet the requirement as "aborted purchasers."[17] More recently, the purchaser-seller concept has been broadened even further to include trust beneficiaries[18] and offerees of securi-

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627 (2d Cir. 1967), *cert. denied*, 389 U.S. 970 (1967); Johns Hopkins Univ. v. Hutton, 326 F. Supp. 250 (D. Md. 1971). *But see*, Miller v. Steinback, 268 F. Supp. 255 (S.D.N.Y. 1967).

12. *E.g.*, Mount Clemens Industries, Inc. v. Bell, 464 F.2d 339 (9th Cir. 1972); Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1972); Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970); Erling v. Powell, 429 F.2d 795 (8th Cir. 1970); Simmons v. Wolfson, 428 F.2d 455 (6th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971); Rekant v. Desser, 425 F.2d 872 (5th Cir. 1970); City National Bank of Ft. Smith, Ark. v. Vanderboom, 422 F.2d 221 (8th Cir. 1970); Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969); Knauff v. Utah Construction & Mining, 408 F.2d 958 (10th Cir.), *cert. denied*, 396 U.S. 831 (1969). For a discussion of the reasons supporting the rule see, Comment, *10b-5 Standing Under Birnbaum: The Case of the Missing Remedy*, 24 HAST. L.J. 1007, 1029-34 (1973).

13. 193 F.2d 461 (2d Cir. 1952).

14. *E.g.*, Whitaker, *The Birnbaum Doctrine: An Assessment*, 23 ALA. L. REV. 543 (1971); Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5*, 54 VA. L. REV. 268 (1968); Comment, *Another Demise of the Birnbaum Doctrine: Tolls the Knell of Parting Day?*, 25 U. MIAMI L. REV. 131 (1970). The standing requirement enunciated in Birnbaum comprises only one half of the doctrine. The second element, which will not be discussed in this comment, deals with the nature of the fraud that is cognizable under Rule 10b-5. Birnbaum v. Newport Steel Corp., 193 F.2d at 464.

15. Friedman, *The Concepts of Purchase and Sale Under the Federal Securities Laws*, 14 N.Y.L. FORUM 608 (1968).

16. Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir. 1967), *cert. denied*, 389 U.S. 970 (1967).

17. Commerce Reporting Co. v. Puretec, Inc., 290 F. Supp. 715 (S.D.N.Y. 1968).

18. James v. Gerber Products Co., 483 F.2d 944 (6th Cir. 1973); Heyman v. Heyman, 356 F. Supp. 958 (S.D.N.Y. 1973).

ties under a consent decree.[19] By virtue of this broad construction of the purchaser-seller requirement, the requirement has been criticized by jurors[20] and writers[21] alike.

It must further be established that in some situations the purchaser-seller requirement has been entirely eliminated. Individuals suing derivatively[22] and those seeking injunctive relief[23] have standing to sue under Rule 10b-5 even though they do not allege that they are purchasers or sellers. And one circuit court of appeals has explicitly repudiated the requirement in damage actions.[24]

This comment will portray the Rule 10b-5 law of standing and the analysis the judiciary has employed to identify the class of persons entitled to sue under the Rule. It will also comment on the effects that recent cases have had on either expanding or limiting the class of persons entitled to invoke the Rule's protection. Specific instances of inconsistency among the circuit courts will be identified and a possible solution to the conflict will be offered.

The Birnbaum Doctrine

In *Birnbaum*, stockholders of the Newport Steel Corporation brought an action on behalf of the corporation and all similarly situated stockholders for alleged violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5. It was alleged that the Newport Steel Corporation was in the hands of one Feldman who owned approximately forty per cent of the common stock of the corporation, and served as president and chairman of the board of directors. In the latter part of 1950, Feldman sold his stock to the Wilport Company at a substantial premium and in disregard of a merger offered by the Follansbee Steel Corporation to the Newport Steel Corporation which would have been very profitable to the shareholders of Newport. Feldman falsely represented in letters to the shareholders of Newport that the negotiations for merger with the Follansbee Corporation had been terminated because of fluctuating international conditions. The district court dismissed the action under Rule 10b-5 holding that the Rule is not aimed at breaches of fiduciary duty by corporate insiders and that only fraud upon purchasers or sellers of securities is cognizable under the Rule. On appeal, Circuit Judge Augustus Hand affirmed the trial court's decision reasoning that Rule 10b-5 was

19. Manor Drug Stores v. Blue Chip Stamps, CCH Fed. Sec. L. Rep. ¶ 94,191 (9th Cir. Oct. 15, 1973).
20. *See* Entel v. Allen, 270 F. Supp. 60 (S.D.N.Y. 1967).
21. *See* Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era for 10b-5*, 54 Va. L. Rev. 268 (1968).
22. Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970).
23. Mutual Shares Corp. v. Genesco, Inc., 384 F. 2d 540 (2d Cir. 1967).
24. Eason v. General Motors Acceptance Corp., CCH Fed. Sec. L. Rep. ¶ 94,344 (7th Cir. Dec. 28, 1973).

promulgated in order to close a statutory loophole in which sellers of securities had formerly not been protected against fraud.[25] Furthermore, he renounced the appellant's argument that the rule extended to protecting investors from mismanagement by corporate insiders and held that the Rule "extended protection only to the defrauded purchaser and or seller."[26]

As a consequence of the *Birnbaum* holding, courts generally require the plaintiff who brings an action for damages under Rule 10b-5 to allege that he either purchased or sold securities pursuant to a fraudulent scheme.[27] However, this requirement has been applied flexibly.

EXPANSION OF THE PURCHASER-SELLER CONCEPT

A. *"Forced purchaser-seller" cases.*

One of the departures from a strict application of the purchaser-seller requirement is based on the concept of a "forced" purchase or sale of securities and usually involves two distinct situations. The first of these is where the courts look to the practical consequences of the allegations of the complainant and hold that for purposes of the statute the plaintiff is deemed to be a seller even though he has not sold any securities. This analysis is enunciated in a line of cases based on *Vine v. Beneficial Finance Company.*[28] In *Vine*, the defendant corporation acquired stock in a corporation in which the plaintiff was a minority stockholder. The defendant corporation had statutory authority to merge the two corporations in a short form merger without the approval of shareholders of plaintiff's corporation, thus leaving the plaintiff with the option of either exchanging his stock pursuant to the merger plan or exercising his statutory right of appraisal. The Second Circuit Court of Appeals held that in such a case the plain-

25. Birnbaum v. Newport Steel Corp., 193 F.2d at 463.
26. *Id.* at 463-64.
27. Shareholders who merely allege corporate mismanagement with respect to a sale or purchase of control of the corporation by the defendant uniformly are denied standing. *E.g.*, Haberman v. Murchison, 468 F.2d 1305 (2d Cir. 1972); Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970); Erling v. Powell, 429 F.2d 795 (8th Cir. 1970). A holder of securities that had decreased in value due to defendant's corporate mismanagement likewise is denied standing. Greenstein v. Paul, 400 F.2d 580 (2d Cir. 1968). Furthermore, persons alleging that tender offers had failed due to the fraud of the defendants upon third parties are held to lack standing. *E.g.*, H.K. Porter Co., Inc. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1973); Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969). *But see* Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969).
28. 374 F.2d 627 (2d Cir. 1967), *cert. denied*, 389 U.S. 970 (1967).

tiff was a seller of securities for the purpose of Rule 10b-5. The holding was based on the analysis that "[s]ince, in order to realize any value for his stock appellant must exchange the shares for money from appellee, as a practical matter appellant must eventually become a party to a 'sale' as that term has always been used."[29]

This analysis was followed by the Fifth Circuit Court of Appeals in *Coffee v. Permian Corporation*,[30] in which the plaintiff alleged that he was a shareholder of a corporation that was to be liquidated pursuant to a fraudulent scheme. Although the court adopted *Vine's* "practical consequences" analysis, holding that the liquidation of the corporation would force Coffee to become a seller, it warned that Coffee may not be a "forced seller" within the meaning of the *Vine* case if at trial it was found that the corporation was not actually liquidated.[31] With this caveat, the court emphasized the requirement that a disposition of securities by the plaintiff must take place in order to bring a successful action under Rule 10b-5.

The second situation encompassed by the forced purchaser or seller concept involves factual settings where the plaintiff is compelled, for one reason or another, to purchase or sell securities. In *Crane Co. v. Westinghouse Air Brake Co.*,[32] Crane, a substantial holder of Westinghouse stock, made a tender offer to the shareholders of Westinghouse. However, the success of the tender offer was thwarted due to the fraud of the defendants upon the shareholders of Westinghouse in inducing them not to tender their stock. Instrumental in the fraudulent scheme was a third corporation, Standard, which subsequently merged with Westinghouse. Crane, by virtue of its substantial holdings of Westinghouse stock, thereby became a substantial shareholder of Standard. Because Crane and Standard were competitors, Crane was compelled to sell most of its Standard stock under threat of an antitrust suit. The court held that Crane "was one of the class of persons intended to be protected" by the Rule and that Crane was in a situation analogous to that of the dissenting shareholders in *Vine* since Crane was forced to sell the securities.[33]

In *Jefferies & Co., Inc. v. Arkus-Duntov*,[34] an analogous situa-

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29. *Id.* at 634.
30. 434 F.2d 383 (5th Cir. 1970).
31. *Id.* at 386. *See also* Dudley v. Southeastern Factor & Finance Corp., 446 F.2d 303 (5th Cir.), *cert. denied*, 404 U.S. 858 (1971).
32. 419 F.2d 787 (2d Cir. 1969).
33. *Id.* at 794. While Crane technically falls within the "forced seller" rationale, numerous courts have not interpreted the decision so restrictively. Those courts base their approach on certain language in the decision that may warrant a more liberal interpretation of the case. *See, e.g.*, Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834 (D.N.J. 1972); H.K. Porter Co. Nicholson File Co., 353 F. Supp. 153 (D.R.I. 1972).
34. 357 F. Supp. 1206 (S.D.N.Y. 1973).

tion was presented, except the plaintiff in that case was forced to purchase rather than sell securities. In *Jefferies* the defendant ordered the plaintiff, a broker with a seat on the New York Stock Exchange, to sell stock. However, due to the fraud of the defendant upon the purported purchaser of the securities, the plaintiff was unable to consummate the transaction. Because the plaintiff had already issued checks for the contemplated proceeds in the mistaken belief the transaction would be completed, he was compelled to keep the stock. The court simply held that the plaintiff was an "involuntary" purchaser of the securities.[35]

The court in *Jefferies* relied in part on a decision reached in *A.T. Brod & Co. v. Perlow*,[36] in which the plaintiffs, also brokers, were ordered to buy stock for the defendants who secretly intended to pay for the order only if the price of the stock rose. The price of the securities fell and the defendants refused to pay for the stock. The plaintiffs then sold the securities at a loss. The court declared in a footnote that the plaintiff was "clearly a purchaser of securities," even though he exercised no conduct normally associated with a typical purchase of securities.[37]

Examining the fact situations of these "forced purchaser-seller" cases, there are certain salient features. First, the fraud complained of need not be aimed at the plaintiff, although it often is. This was certainly true in *Crane* and *Jefferies*. Second, the "forced" transaction need not be the essential purpose of the fraud, although again it often is. In *Crane* the fraudulent purpose was to preclude Crane from successfully completing his tender offer.[38] In *Brod* the essential purpose of the scheme was to provide the defendants with a fail-safe method of profitably buying stock.[39] With this in mind, the question becomes to what extent does the fraud have to cause the forced transaction. There is disagreement as to where the line should be drawn.

In *Landy v. Federal Deposit Insurance Corporation*,[40] the defendant, president of a defunct bank, through a misuse of bank funds in stock market speculation, brought the bank to financial collapse, thereby necessitating liquidation of the bank. The plaintiffs, shareholders of the defunct bank, argued in part that by virtue of the liquidation they became "forced sellers" as that

35. *Id.* at 1213.
36. 375 F.2d 393 (2d Cir. 1967).
37. *Id.* at 397, n.3.
38. Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 792 (2d Cir. 1969).
39. A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967).
40. 486 F.2d 139 (3d Cir. 1973).

term was used in *Vine, Coffee* and *Dudley*. The court rejected the argument, stating that:

> Each of these "forced seller" cases possesses elements not present in the case before us. In each case, the majority shareholder of a corporation or other insiders were taking advantage of its minority shareholders. In each, the fraudulent scheme was an integral part of the forced sale and the transaction attacked. In each, the fraudulent scheme was directly related to and in connection with the forced sale. On the other hand, in this case the purpose of Schotte (the president) and the brokers was not to achieve a forced sale of the bank stock. The alleged fraud of the brokers was not in connection with the putative "forced sale" in the bank liquidation.[42]

Not only does this analysis fail to consider and seems to be inconsistent with the holding in *Crane*, it is most definitely contrary to the language used in *Vine* in which the court held that the plaintiff "would never be in the position of a forced seller were it not for the fraud."[43] Thus *Vine* uses "but for" type of analysis whereas *Landy* requires a direct causal connection, effectively proven by the elements of intent and purpose by the defendant to have the plaintiff sell securities. Consequently, *Landy* seems to restrict the scope of the "forced purchaser-seller" concept. Instead of recognizing that the concept can be applied to cases similar to *Crane, Brod,* and *Jefferies*, the Third Circuit Court strictly construes *Vine, Coffee* and *Dudley*, thereby limiting the class protected.

B. *Aborted Transactions.*

A second modification of the *Birnbaum* doctrine involves cases where a contemplated securities transaction has been aborted due to the fraud of the defendant. The cases categorized herein fall into two groups speciously distinguished by virtue of their analyses. One group is composed of cases which analyze the issue in terms of the existence of a contractual relationship between the parties without expounding upon the reason why such a relationship is important.[44] The other group consists of cases where the analysis is based on the causal connection between the alleged

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41. *Id.* at 143.
42. *Id.* at 159.
43. Vine v. Beneficial Finance Co., 374 F.2d at 635.
44. Although the statutory definitions of the words "purchase" and "sale" are seldomly referred to in resolving who is a purchaser or seller for purposes of Rule 10b-5, *see* S.E.C. v. National Securities, Inc., 393 U.S. 453, 466-67 (1969), it seems that to use the definitions as an analytic tool in the breach of contract cases would be appropriate as "sale" is defined in the statute to "include any contract to sell or otherwise dispose of securities," 15 U.S.C. § 78c(14) (1970), and purchase is defined to "include any contract to buy, purchase or otherwise acquire securities. . . ." 15 U.S.C. § 78c(13) (1970). *See generally,* Whitaker, *The Birnbaum Doctrine: An Assessment,* 23 ALA. L. REV. 542 (1971).

fraud and the injury suffered by the plaintiff and on the existence of a contractual relationship or its functional equivalent.

The pure contractual relationship analysis was first illustrated in the relatively simple factual setting of *Opper v. Hancock Securities Corp.*[45] In that case the plaintiff alleged that the defendant, a broker, failed to carry out the plaintiff's order to sell securities. The court affirmed a verdict for the plaintiff, holding quite simply that there was a contract for the broker to sell.[46] The nature of the analysis did not become definitive until later when courts, in construing other cases involving aborted transactions, looked for a "contractual relationship" such as found in *Opper* before holding that a plaintiff had standing. Thus, the court held that the plaintiff in *Mount Clemens Industries, Inc. v. O. M. Bell,*[47] who alleged that he was merely precluded from bidding on and purchasing securities at a sheriff's sale because of the fraud of the defendant, lacked standing by virtue of the fact that there was no contractual relationship.[48] In *Lanning v. Sherwold,*[49] the plaintiff alleged that he attempted to buy 500 shares of Paulsbo Rural Telephone Association from minority shareholders but that he was prevented from doing so because of deceptive letters mailed to the offerees by the defendant. The court held that because Lanning had no contractual relationship with anyone either as a purchaser or seller, he had no standing with respect to these shares.[50] However, Lanning also alleged that he contracted to purchase 136 shares from two women, but that due to the fraud of the defendant the women attempted to rescind the contract. This resulted in Lanning incurring expenses by having the contract enforced. The court allowed the plaintiff to recover for the loss incurred because it found with respect to the 136 shares a prior contractual relationship.[51]

In both *Goodman v. H. Hentz & Co.*,[52] and *Commerce Reporting Co. v. Puretec, Inc.*,[53] only the causal connection between the alleged fraud and the aborted transaction is emphasized. *Goodman* involved a broker who fraudulently represented to the plaintiff that sales of securities were being made when in reality no

45. 367 F.2d 157 (2d Cir. 1966).
46. *Id.*
47. 464 F.2d 239 (9th Cir. 1972).
48. *Id.* at 340.
49. 474 F.2d 716 (9th Cir. 1973).
50. *Id.* at 718.
51. *Id.* at 718. *Accord,* Walling v. Beverly Enterprises, 476 F.2d 393 (9th Cir. 1973).
52. 265 F. Supp. 440 (N.D. Ill. 1967).
53. 290 F. Supp. 715 (S.D.N.Y. 1968).

sales were made. In addition, the defendant was selling to the plaintiff non-existent securities. The court, holding that the plaintiff had standing, reasoned that "the plaintiffs were actual parties to transactions which *for* the fraud of Rubloff would have been actual purchases or sales."[54] The District Court in *Commerce Reporting* held that,

> . . . it is unnecessary to prove a consummated, or closed, purchase or sale as a condition to the institution of such suit [under Rule 10b-5]. Here . . . the plaintiffs allege in substance *but for* the defendant's fraud, their purchase of stock . . . would have been consummated.[55]

Thus, these cases purport to emphasize the causal connection between the defendant's fraud and failure of the transaction to take place. However, the lack of importance of the causal connection independent of other factors becomes apparent when one considers the frustrated tender offer cases in which it is generally held that the frustrated offeror has no right to sue.[56] If the only factor that was required was a "but for" causal connection between the defendant's fraud and the failure of a consummated transaction, the tender offer cases would clearly meet it because securities transactions would be complete but for the fraud of the defendant. Thus, it is evident that more than a mere "causal connection" is required. It is the presence or absence of this additional element that will determine whether the plaintiff's case will be dismissed. The question is whether a contractual relationship alone between plaintiff and defendant is the added element. Due to the fact that courts rarely refer to the statutory definitions of the terms purchase and sale in support of their "contractual relationship" analysis,[57] it is at most questionable. In *Manor Drug Stores v. Blue Chip Stamps*[58] the court held that it was not, as long as there was a relationship that acted as a "functional equivalent" to contractual relationship.[59]

In *Manor Drug*, the defendant corporation, in conjunction with a consent decree, offered to the plaintiffs a specified percentage of the capital stock of the corporation. The offering was to be made in units of three shares of common stock and a $100 debenture for the price of $101. Each unit had a fair market price of $315. Through the fraud of the defendant, the plaintiffs failed to purchase the units to which they were entitled and they brought

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54. Goodman v. H. Hentz & Co., 265 F. Supp. 440, 444 (N.D. Ill. 1967).
55. Commerce Reporting Co. v. Puretec, Inc., 290 F. Supp. 715, 718-19 (S.D.N.Y. 1968).
56. *E.g.*, H.K. Porter Co., Inc. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1973); Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969). *See also* Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969).
57. *See* note 44.
58. CCH. FED. SEC. L. REP. ¶ 94,191 (9th Cir. Oct. 15, 1973).
59. *Id.* at 94,820.

an action under Rule 10b-5 when the securities subsequently appreciated in value. In finding that the plaintiff had standing the court construed the purchaser-seller standing requirement as resting upon two considerations: (1) the effectuation of the legislative intent to protect the purity of securities transactions, and (2) the assumption that an allegation of a purchase or sale by the plaintiff will ensure adequate proof of loss and causal connection with the alleged fraud.[60] The court reasoned that as to the second consideration the requirement of contractual relationship will serve the same function, thus eliminating the reason and need for the purchaser-seller requirement.

> Such contracts often furnish objective evidence of the reality of a plaintiff's intention to purchase or sell but for the fraud, and thus of causation. They may also fix the price, quantity, and time of sale, thus making it possible to calculate damages.[61]

The court then held that the consent decree fulfilled the same function of ensuring adequate objective proof of loss and causation, as well as preventing the possibility of ruinous liability since there were only a limited number of offerees. Therefore, the court continued, the relationship arising out of the consent decree should be accorded the same position as a basis for standing to frustrated purchasers as the contractual relationship.[62]

Although *Manor Drug* looks to the "contractual relationship" line of cases for support, it extends the scope of their holding one step further and bases it on an analysis not present in those cases.[63] In all the cases where the plaintiff was deemed to have standing even though the stock transaction that was the object of the complaint was aborted, the plaintiff was more than a mere offeree of securities.[64] In *Manor Drug* the plaintiffs were mere offerees under a consent decree who decided not to purchase the offered securities and are now coming into court because they realized that they failed to take advantage of an economically beneficial opportunity.

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60. *Id.* at 94,818.

61. *Id.* at 94,819-820.

62. *Id.* at 94,820. Circuit Judge Huftedler voiced a vociferous dissent denouncing the "functional equivalent" analysis of the majority and attacking the assumptions underlying the analysis. *Id.* at 94,820 (dissenting opinion).

63. *See* Manor Drug Stores v. Blue Chip Stamps, CCH FED. SEC. L. REP. ¶ 94,191 (9th Cir. Oct. 15, 1973) (dissenting opinion).

64. *See, e.g.*, Lanning v. Sherwold, 474 F.2d 716 (9th Cir. 1973); Opper v. Hancock Securities Corp., 367 F.2d 157 (2d Cir. 1966); Commerce Reporting Co. v. Puretec Inc., 290 F. Supp. 715 (S.D.N.Y. 1968); Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967).

Although the court in *Manor Drug* finds solace in the fact that a functional equivalent of a contractual relationship permits a reasonable circumscription of a defendant's potential liability,[65] it fails to take into account the multifarious types of securities transactions that would meet the "functional equivalent" test and constitute a squal upon the floodgates of the judiciary as they would enable the parties engaged in these transactions to sue under the *Manor Drug* theory. The most notable of these would be options and warrants whereby the holder of the option or warrant would be able to refrain from exercising his right to purchase, and then, when the price of the security rises after his option or warrant has expired, bring an action for damages under Rule 10b-5 claiming that but for the fraud of the defendant he would have purchased securities. In such a case, the offeree, like the offeree under a consent decree, would be able to illustrate easily that he is within the class of persons to be protected as the purity of a stock transaction was violated. Moreover, there would be easily ascertainable proof of loss and causation as the price, quantity and time of sale are fixed. Furthermore, he would be in an even stronger position than an offeree under a consent decree as the enforceability of a consent decree by the beneficiary of the decree is debatable,[66] whereas the holder of an option or warrant possesses definitive legal rights.

A variation of the option device that would also meet the "functional equivalent" test of *Manor Drug* is the "down and out" option that is now being traded. This device not only sets a price and expiration date for the exercise of the option, but provides that if the market price of the security goes down to a specified level, the option terminates. If the stock goes down, you're out. With such a device, the offeree who is precluded from purchasing the security because its price hit the cut off level as a result of the fraud of the defendant would be able to establish standing on the *Manor Drug* theory and profitably sue if the price of the security escalates. Other persons who would have standing under this analysis would include offerees participating in an employee stock option program, former holders of convertible securities, shareholders of corporations which provide optional reinvestment plans,[67] and shareholders who have pre-emptive rights.[68] Al-

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65. Manor Drug Stores v. Blue Chip Stamps, CCH FED. SEC. L. REP. ¶ 94,191 (9th Cir. Oct. 15, 1973).

66. *Id.* at 94,821.

67. *See* AMERICAN TELEPHONE & TELEGRAPH CO., PROSPECTUS (May 9, 1973) and SUPPLEMENT (Sept. 24, 1973).

68. *See* Hardy v. Sanson, 356 F. Supp. 1034 (N.D. Ga. 1973), in which the court held that,

> the only incident alleged in the present case resembling a proposed sale and purchase agreement was the thirty day pre-emptive right extended to plaintiff Tallant. Tallant, however, simply failed to

though the legal relationship between these people and their respective offerors are distinguishable, this is not determinative as the analysis of *Manor Drug* does not depend upon the strength of the legal bonds. On the contrary, the analysis is totally dependent upon whether the relationship is a functional equivalent of a contractual relationship; and the function is to provide the court with objective evidence of causation and loss.[69] The consequence of such situations is that offerors under the various devices would be under a duty to a class of investors to whom no duty would be owed under a more rigid adherence to the purchaser-seller requirement.

C. *De Facto Sellers*

Another area in which courts will grant standing to non-purchasers and nonsellers involves situations where the interest of the plaintiff in securities that are traded is so great that the courts will grant the complainant standing even though the complainant is not involved directly in any transaction. These cases may appropriately be entitled "de facto seller" cases by virtue of the close connection between the sale of the securities and the plaintiff.

One situation involves a trust beneficiary's right to sue when the trustee has sold securities pursuant to a fraudulent scheme. The two cases holding that the beneficiary has standing, *James v. Gerber Products Co.*,[70] and *Heyman v. Heyman*,[71] base their decisions on an analysis that is restricted and seems to be limited only to the trust beneficiary situation. In *Heyman* the court held that although the beneficiary was not the seller, "she was one who immediately stood to gain or lose by the sale. . . . [She] was the beneficiary of the sale. That is the nexus missing in the line of cases which follow *Birnbaum*."[72] In *James* the court restricted its analysis in the same manner as did the *Heyman* court and held that the beneficiary "had the interest of a de facto seller. In this respect she is much closer to the transaction than the plaintiffs in the *Birnbaum* case."[73]

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exercise his right within the designated period and there was no allegation that this failure was in any way owing to fraud on the part of defendants.

Id. at 1039.

69. Manor Drug Stores v. Blue Chip Stamps, CCH FED. SEC. L. REP. ¶ 94,191 (9th Cir. Oct. 15, 1973).

70. 483 F.2d 944 (6th Cir. 1973).

71. 356 F. Supp. 958 (S.D.N.Y. 1973).

72. *Id.* at 965.

73. James v. Gerber Products Co., 493 F.2d 944 (6th Cir. 1973). *Contra*, Ripper v. Denver United States Nat. Bank, 260 F. Supp. 704 (D. Colo. 1966).

The other de facto seller situation is exemplified by *Cambridge Capital Corp. v. Northwestern National Bank of Minneapolis*,[74] in which securities were sold at a sheriff's sale and the plaintiff possessed prior to the sale a security interest in the securities sold. The court reasoned that because of the security interest "the plaintiff held many of the normal rights and indicia of ownership with respect to the securities," and that as a result, he qualified as a seller of securities.[75]

The analysis used by the courts in both of the de facto seller situations seems to be fashioned for the particular factual pattern in which they were used and therefore incapable of extrapolation to other factual settings. With regard to the trust beneficiary situation, there are no other legal devices so closely analogous to a trust that the rationale of either the *Heyman* or *Gerber* cases can be applied without changing them. Similarly, the "indicia of ownership" held by a secured creditor is peculiar to the secured transaction situation. Although the analyses of these cases seemingly fail to provide precedent for an expansion of the class, protected by Rule 10b-5, it is questionable whether the concept of seller should be construed so broadly as to include trust beneficiaries. One of the underlying rationales of the purchaser-seller requirement is that it precludes federal securities legislation from encroaching upon the jurisdiction of the States with regard to traditionally local affairs. This is most often expressed in cases imvolving corporate mismanagement. In *Superintendent of Insurance v. Bankers Life & Casualty Co.*,[76] the Supreme Court maintained that "Congress by 10(b) did not seek to regulate transactions which [amount] to no more than internal corporate mismanagement."[77] Since the regulation of trusts traditionally has been a state function and both of the trust beneficiary cases involved mere breaches of the trustee's fiduciary duty the argument could be made that by allowing the beneficiary to bring a cause of action under Rule 10b-5 the judiciary would be expanding federal securities legislation beyond its bounds. Consequently, it appears that the de facto seller rationale, although palatible to our sense of justice, stands opposed to the function of the purchaser-seller requirement to keep the federal judiciary from meddling in traditionally local affairs.

D. *Shareholders of Merged Corporations*

The courts have uniformly held that a shareholder of a corporation that is merged into another corporation has standing to sue under Rule 10b-5.[78] In *SEC v. National Securities*,[79] the court

74. 350 F. Supp. 829 (D. Minn. 1972).
75. *Id.* at 833-34.
76. 404 U.S. 6 (1971).
77. *Id.* at 12.
78. *E.g.*, S.E.C. v. National Securities, Inc., 393 U.S. 453 (1969); Mader v. Armel, 402 F.2d 158 (6th Cir. 1968), *cert. denied*, 394 U.S. 903 (1969);

adopted the following reasoning to support its conclusion:

> Whatever the terms 'purchase' and 'sale' may mean in other contexts, here an alleged deception has affected individual shareholders' decisions in a way not at all unlike that involved in a typical cash sale or share exchange. The broad antifraud purposes of the statute and the rule would clearly be furthered by their application to this type of situation.[80]

Although the presence of conduct approximating a typical investment decision seems to be the focal point of the *National Securities* case,[81] the other merger cases reach their result on an analysis of the broad statutory definition of the terms "purchase" and "sale."[82] The court in *Dasho v. Susquehanna Corporation*[83] emphasized that the acquisition or disposition of securities in the merger situation is encompassed in the statutory definition of purchase and sale.[84] Therefore, the principal difference between the two analyses is based upon the element of volition on the part of the plaintiff being affected by the defendant's fraud. In *National Securities* the fraud on the part of the defendant which influenced the plaintiff's investment decision was crucial; whereas, the existence of some sort of securities transaction is determinative in *Dasho*. Although the two analyses lead to the same result with respect to similar situations, the two analyses are opposed and may lead to different results in some cases depending on which analysis is used.

The element of volition was seized upon as controlling in *In re Penn Central Securities Litigation*.[85] In that case the plaintiffs were shareholders of the Penn Central Corporation which had undergone an upward merger. Counsel for the plaintiff argued that the plaintiffs met the purchaser-seller requirement of Rule 10b-5 as the securitities which they held after the upward merger gave them economic and legal rights which were substantially different than they had before the upward merger. Although this argument would be plausible under the analysis used by the court in

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Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967). *See also* Nanfito v. Tekseed Hybrid Co., 473 F.2d 537 (8th Cir. 1973), where shareholders of the surviving corporation were deemed to have standing. The action, however, failed on other grounds.

79. 393 U.S. 454 (1969).
30. *Id.* at 467.
81. S.E.C. v. National Securities, Inc., 393 U.S. at 467.
82. Mader v. Armel, 402 F.2d at 160-61; Dasho v. Susquehanna Corp., 380 F.2d at 266. *See* note 44.
83. 380 F.2d 262.
84. *Id.* at 266.
85. 357 F. Supp. 869 (E.D. Pa. 1973).

Dasho, since there the court looked to the change in securities held by the plaintiff, it fails under the *National Securities* analyses. Relying on *National Securities*, the court in *Penn Central* rejected the plaintiff's argument because, the court held, the change of legal and economic rights was not affected by any investment decision made by the plaintiff.[86] This analysis is questionable. Exercise of investment decision is not a prerequisite for standing under the *Birnbaum* rule.[87] In the "forced seller" line of cases this element was certainly missing.[88]

The decision of the case is good however. If the arguments of the plaintiff were upheld, innumerable situations would be brought in the ambit of Rule 10b-5 that were not intended to be governed by the rule. For example, any substantial internal corporate action, such as the issuance of securities[89] or the reorganization of the corporation would affect the legal and economic rights of its shareholders, thereby providing the shareholders with a remedy under Rule 10b-5 if the *Penn Central* decision was contrary.

Abandonment of the Purchaser-Seller Requirement

A. *Injunctive Relief*

The purchaser-seller requirement was first abandoned when courts began to distinguish the nature of the remedy sought by the plaintiff. The distinction and its ramifications were made clear in *Mutual Shares v. Genesco*[90] where it was held that the failure to purchase or sell securities is not a defect that would preclude standing in a suit for injunctive relief.[91] This was based on two theories: (1) in a suit for injunctive relief the problems of proof of damages and causation are avoided and, (2) for policy considerations investors would be aiding the SEC in enforcing the securities laws.[92] Although the court in *Mutual*

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86. *Id.* at 873.

87. In Condon v. Richardson, 275 F. Supp. 943 (S.D. Ill. 1967), it was held that a sale under Rule 10b-5 is "any transaction which partakes of the character of a sale in its impact on the interests of a corporation and its shareholders. . . ." *Id.* at —. *See* Friedman, *The Concept of Purchaser and Sale Under the Federal Securities Laws*, 14 N.Y.L. Forum 608, 615-18 (1968).

88. *See* notes 28-43 and accompanying text *supra*.

89. This possibility is not as far fetched as it seems. In both Coffee v. Periman Corp., 434 F.2d 383 (5th Cir. 1970), and Wolf v. Frank, 477 F.2d 467 (5th Cir. 1973), the respective plaintiffs argued in part that the change of his equity interest caused by the fraud of the defendant was sufficient by itself for them to meet the purchase-seller requirement.

90. 384 F.2d 540 (2d Cir. 1967).

91. *Id.* at 546. *See* Ruckle v. Roto American Corp., 339 F.2d 24 (2d Cir. 1964), *and* S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963), in which it was held that "it is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages." *Id.* at 193.

92. Mutual Shares v. Genesco, 384 F.2d 540, 546-47. *See* Federal Savings & Loan Insurance Corp. v. Fielding, 309 F. Supp. 1146 (D. Nev. 1969),

Shares failed to explicitly hold what was required to establish standing in a suit for injunctive relief, the requirement that direct causal connection exist between a purchase or sale of securities and the plaintiff's injury seems to be establishing itself.[93]

Recognizing the distinction that the judiciary makes between an action for damages and a suit in equity, it is important to question whether the reasons which support that distinction are important enough to justify its continuation. The District Court of Utah in *Young v. Seaboard Corp.*[94] held that they were not and that the distinction was therefore invalid.[95] In *Young* the plaintiffs were shareholders of a defunct bank and alleged the defendants fraudulently sold certificates of deposit for $1 million and an illegal finders fee and then used a substantial portion of the deposits to make bad loans to the designees of the defendants thereby rendering the bank insolvent.[96] The court held, basing its decision on the holding in *Vincent v. Moench*,[97] which involved a suit for injunctive relief, that the plaintiffs had standing as there was an unbroken chain linking the defendant's alleged fraud, the plaintiff's loss and the deposit transactions which themselves constituted a purchase and sale of securities.[98] Even though the Circuit Court in *Vincent* was concerned with a suit for injunctive relief, the District Court in *Young* claimed that the language used by the Circuit Court "suggests" that the question of who may sue in damage actions as well as in injunctive suits should be decided by applying a causal analysis and the law of damages rather "than through the erection of standing barriers supposedly anchored in the statute itself but which are frequently elbowed aside."[99] If District Judge Anderson, speaking for the court in *Young* is correct in his interpretation of the *Vincent*

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cert. denied, — U.S. — (1971), in which the plaintiff brought an equitable suit for restitution and was granted standing on the analysis that in suits in equity the plaintiff need not be a purchaser or seller.

93. Vincent v. Moench, 473 F.2d 430 (10th Cir. 1973); Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834 (D.N.J. 1972). *See, e.g.*, G.A.F. Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970), *cert. denied*, 398 U.S. 950 (1970); Greater Iowa Corp. v. Mclendon, 378 F.2d 783 (8th Cir. 1967).

94. 360 F. Supp. 490 (D. Utah 1973).

95. *Id.* at 494. *See* Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834 (D.N.J. 1972), which involved a suit for injunctive relief and the court held that standing should not be dependent upon the remedy sought. *Id.* at 840.

96. The fact situation presented in this case is hauntingly similar to that in the Landy case. *See* note 40 and accompanying text *supra*.

97. 473 F.2d 430 (10th Cir. 1973).

98. Young v. Seaboard Corp., 360 F. Supp. at 494-95.

99. *Id.* at 494-95.

case, the Tenth Circuit Court of the United States has overruled the *Birnbaum* rule. The requirements for standing would then be the existence of a purchase or sale of securities, not necessarily by the plaintiff, touching a fraudulent scheme cognizable under Rule 10b-5 causing loss to the plaintiff.

The effects of such a causal test as applied by the District Court of Utah are omnipotent. The right to sue would belong to an enlarged class of persons. Under the purchaser-seller requirement the minority shareholders of a corporation traditionally were denied standing where the holders of control of the corporation sold pursuant to a fraudulent scheme.[100] However, under the causal analysis such minority shareholders would be able to bring an action for damages providing they could meet the causal requirement and allege the type of fraud proscribed by Rule 10b-5. Another area in which plaintiffs were traditionally denied standing to sue for damages because they did not meet the purchaser-seller requirement involves aborted tender offers.[101] However, under the analysis used in *Young*, some of the cases may have been decided differently. In *Iroquois Industries, Inc. v. Syracuse China Corporation*[102] the alleged fraudulent scheme employed by the defendants to resist the tender offer included the purchase by the defendants of the shares of any shareholder who wanted to accept the tender offer. Thus, upon allegations of loss and causal connection between such loss and the fraudulent purchase of the shareholders stock by the defendant, the situation in *Iroquois* meets the formula for standing set out in *Young*. On the other hand, the plaintiff in *H. K. Porter Co., Inc. v. Nicholson File Co.*[103] would probably be denied standing even if the analysis of *Young* was used as the requirement that the loss be caused by the purchase or sale of securities is missing.[104] In that case the alleged fraudulent scheme involved merely the issuance of false and misleading statements by the defendants to the stockholders rather than the purchase of stock as in the *Iroquois* case. Consequently,

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100. *E.g.*, Haberman v. Murchison, 468 F.2d 1305 (2d Cir. 1972); Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970); Erling v. Powell, 429 F.2d 795 (8th Cir. 1970); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952).

101. *E.g.*, H.K. Porter Co., Inc. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1973); Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969). *See* Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969).

102. 417 F.2d 963 (2d Cir. 1969).

103. 482 F.2d 421 (1st Cir. 1973).

104. *See* note 94 and accompanying text *supra*. Although the court in Young v. Seaboard Corp., 360 F. Supp. 490 (D. Utah 1973), does not explicitly hold that such a requirement exists; it does so implicitly by holding,

> [i]n the opinion of the court, under the plaintiff's claim both the deposit transactions and the loan transactions would be purchases or sales of securities. . . . As a result, plaintiffs have standing to bring this action under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5.

Id. at 495-96.

even though the cause of the complaint in the two cases is the same—*i.e.* loss through the inability to successfully complete the tender offer—the outcome of each is different because of the method of the fraud rather than its purpose and effect.

B. *Derivative Actions*

Another area where the *Birnbaum* purchase-seller requirement has been sidestepped is in cases where the plaintiff is suing on behalf of a purchaser or seller of securities. This frequently occurs where a shareholder of a corporation is suing derivatively,[105] a trustee in bankruptcy is suing for the bankrupt,[106] or a statutory representative is suing on behalf of the defrauded party.[107] In such cases the plaintiff is merely standing in the shoes of the defrauded party and receives no recovery in his own right for the alleged violation.[108] However, it must be remembered that the entity in whose shoes the plaintiff is standing must meet the requirements to sue under Rule 10b-5.

C. *Repudiation of the Purchaser-Seller Requirement*

The *Birnbaum* doctrine has been explicitly repudiated by the Seventh Circuit Court in *Eason v. General Motors Acceptance Corporation*.[109] In its place the court has offered an "investor" requirement for determining who has standing under Rule 10b-5. In *Eason* the plaintiffs were shareholders of a corporation which purchased a car leasing business from the defendants in exchange for stock. The plaintiffs also acted as guarantors for certain liabilities assumed by the corporate buyer. The court, in denouncing the *Birnbaum* rule, held that the question of whether the plaintiff had a right to relief under Section 10(b) and Rule 10b-5 revolved around three issues: standing in its technical sense, the

105. *E.g.*, Shell v. Hensly, 430 F.2d 819 (5th Cir. 1970); Rekant v. Desser, 425 F.2d 872 (5th Cir. 1970); City National Bank of Fort Smith, Arkansas v. Vanderboom, 422 F.2d 221 (8th Cir. 1970); Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969); Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967); *In re* Caesar's Palace Securities Litigation, 360 F. Supp. 366 (S.D.N.Y. 1973).

106. Bailes v. Colonial Press, Inc., 444 F.2d 1241 (5th Cir. 1971); Hooper v. Mountain States Securities Corp., 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

107. Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971).

108. *See* Shell v. Hensly, 430 F.2d 819 (5th Cir. 1970); Rekant v. Desser, 425 F.2d 872 (5th Cir. 1970); City National Bank of Fort Smith, Arkansas v. Vanderboom, 422 F.2d 221 (8th Cir. 1970).

109. CCH FED. SEC. L. REP. ¶ 94,344 (7th Cir. Dec. 28, 1973).

class intended to be protected by the rule, and policy considerations.[110] In *Eason* the plaintiffs successfully met all three. As to the first issue, the court held that because the outcome of the case will affect the plaintiff in the amount of $300,000 the plaintiff has a sufficient interest in the controversy to meet the standing requirements for federal jurisdiction.[111] As to the second issue, the court held that "investors" encompass the class of persons to be protected by Rule 10b-5 and that the plaintiffs fall within this class because they act as guarantors of certain obligations and were therefore in the middle of the transaction to buy the leasing business in exchange for the stock.[112] With respect to the third issue, the court held that neither the argument that the *Birnbaum* rule prevents a flood of federal litigation nor the argument that it serves to preserve consistency throughout the federal judiciary are sufficient to preclude the plaintiff from suing in this case.[113]

To replace the *Birnbaum* rule, Judge Stevens, speaking for the court, formulated a rule that extends protection to

> persons who, in their capacity as investors, suffer significant injury as a direct consequence of fraud in connection with a securities transaction, even though their participation in the transaction did not involve either the purchase or sale of securities.[114]

This formula is broad as it grants standing to sue even to the individual investor on the street who as a result of the fraud of the defendant failed to purchase securities that subsequently rose substantially.[115] However, the scope is significantly reduced as Judge Stevens warns that the right to private relief under Rule 10b-5 is not unrestricted and should be limited to possibly a "target area" or a "direct injury" type of analysis as is used in determining standing under Section 4 of the Clayton Act.[116] In the final analysis, the court concedes that the effect of the formula proposed in the case will differ slightly from the effect of the purchaser-seller requirement as it is now used.[117] If this is the result, one wonders why the *Birnbaum* rule should be discarded.

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110. *Id.* at 95,160.

111. *Id.* at 95,161. *See* C.A. WRIGHT, FEDERAL COURTS, § 13 (1970); Herpich v. Wallace, 430 F.2d 792, in which the court held that,

> the standing of a private plaintiff to sue for violation of section 10(b) and Rule 10b-5 is to be decided, of course, within the framework of Article III of the United States Constituion which restricts federal judicial power to 'cases' and 'controversies.'

Id. at 805.

112. Eason v. General Motors Acceptance Corp., CCH FED. SEC. L. REP. ¶ 94,344 (7th Cir. Dec. 28, 1973).

113. *Id.* at 95,163 to 64.

114. *Id.* at 95,163.

115. *See* Manor Drug Stores v. Blue Chip Stamps, CCH FED. SEC. L. REP. ¶ 94,191 (9th Cir. Oct. 15, 1973).

116. Eason v. General Motors Acceptance Corp., CCH FED. SEC. L. REP. ¶ 94,344 (7th Cir. Dec. 28, 1973). *See generally* Comment, 77 DICK. L. REV. 73 (1972).

117. *Id.* at 95,164.

Under the investor formula of *Eason* new questions would have to be answered that are not relevant under the purchaser-seller requirement. Are unsuccessful tender offerors within the "special class" to be protected by Rule 10b-5? Are shareholders of a corporation who allege fraud in connection with the purchase or sale of securities by the corporation or by the owner of control within the class protected by the rule? Not only are these questions irrelevant under a doctrine that looks for a purchase or sale of securities, but under the *Eason* formula the answers would seem to be inconsistent with existing case law which has traditionally denied these "investors" standing under the *Birnbaum* rule.[118] Although the *Eason* court held that, insofar as the plaintiffs acted as guarantors in the purchase of the car leasing business, they were certainly investors, the court left open the issue of whether a stockholder of a corporation that engages in a stock transaction is an investor protected by Rule 10b-5.[119] If such a stockholder is an investor, then the investor analysis seems to be equivalent to the causal connection analysis used by the court in *Young v. Seaboard Corp.*[120] and perhaps should be discarded in favor of the analysis used in that case as the difficult and unanswered question of who is an "investor" is avoided.

Conclusion

To determine who has a private right of action under Rule 10b-5, certain basic principles are generally recognized by the federal judiciary. All but one court has recognized that the plaintiff suing for damages must be either a purchaser or seller of securities. However, the classes of people who have been deemed to be purchasers and sellers for purposes of Rule 10b-5 are not simply those that purchase or sell securities in the typical sense of those words. As Judge Stevens has remarked, they include "issuers, trust beneficiaries, merging corporations, minority shareholders in short form mergers, parties to incomplete transactions, offerees, and others. . . ."[121] The purchaser-seller requirement has been

118. *E.g.*, H.K. Porter Co., Inc. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1973); Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970); Erling v. Powell, 429 F.2d 795 (8th Cir. 1970); Iroquois Ind., Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952).

119. *See* Eason v. General Motors Acceptance Corp., CCH Fed. Sec. L. Rep. ¶ 94,344 (7th Cir. Dec. 28, 1973).

120. 360 F. Supp. 490 (D. Utah 1973). *See* notes 94-104 and accompanying text *supra*.

121. Eason v. General Motors Acceptance Corp., CCH Fed. Sec. L. Rep. ¶ 94,344 (7th Cir. Dec. 28, 1973).

generally dispensed with, however, when one is seeking injunctive relief. In such cases the plaintiff must allege a causal connection between a securities transaction and the injury suffered.

Even though these are the basic rules, there are technical distinctions made by various circuits which result in conflict and confusion. To say that the circuit courts are in agreement as to the propriety and application of the purchaser-seller requirement would be less than truthful. There is disagreement as to whether a person suing under Rule 10b-5 must be a purchaser or seller of securities. The circuits that adhere to the purchaser-seller requirement are in disarray as to how flexibly the rule should be applied; and furthermore, the conflict has caused courts and attorneys to deal with similar cases in conflicting ways.

The Seventh Circuit has discarded the requirement altogether, replacing it with an "investor" requirement.[122] That circuit has disavowed the *Birnbaum* rule claiming that it is merely an "appendage" to the holding in that case.[123] The Ninth Circuit has stretched the purchaser-seller requirement to its limits holding that an offeree under a consent decree may sue for damages under Rule 10b-5.[124] It based its decision on the aborted purchaser line of cases favorably ruled upon by the Ninth,[125] Seventh,[126] and Second[127] Circuits, but on an analysis not explicitly adopted by any of them. A striking example of the discord among the circuits involves the interpretation they have given to the Supreme Court's decision in *Superintendent of Ins. v. Bankers Life and Cas. Co.*[128] The Third[129] and First[130] Circuits ruled that *Bankers Life* has not eliminated the purchaser-seller requirement. The Tenth Circuit, on the other hand, held that *Bankers Life* illustrates a trend towards liberal construction of the *Birnbaum* rule,[131] and the District Court in that Circuit has interpreted the Circuit Court's decision as discarding the purchaser-seller requirement altogether.[132] There is also inconsistency among the circuits with respect to the meaning of certain doctrines. The Third Circuit considers the "forced seller" doctrine as a mere legal fiction applicable only to persons who

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122. *Id.* at 95,162.
123. *Id.* at 95,164.
124. Manor Drug Stores v. Blue Chip Stamps, CCH FED. SEC. L. REP. ¶ 94,191 (9th Cir. Oct. 15, 1973).
125. Walling v. Beverly Enterprises, 476 F.2d 393 (9th Cir. 1973); Mount Clemens Industries, Inc. v. Bell, 464 F.2d 339 (9th Cir. 1972).
126. Goodman v. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967).
127. Opper v. Hancock Securities, 367 F.2d 157 (2d Cir. 1966); Commerce Reporting Co. v. Puretec, Inc., 290 F. Supp. 715 (S.D.N.Y. 1968); Stockwell v. Reynolds & Co., 252 F. Supp. 215 (S.D.N.Y. 1965).
128. 404 U.S. 6 (1971).
129. Landy v. Federal Deposit Insurance Corp., 486 F.2d 139, 155 (3d Cir. 1973).
130. H.K. Porter Co., Inc. v. Nicholson File Co., 482 F.2d 421, 425 (1st Cir. 1973).
131. Vincent v. Moench, 473 F.2d 430, 434 (10th Cir. 1973).
132. Young v. Seaboard Corp., 360 F. Supp. 490, 494-95 (D. Utah 1973).

still hold securities, but who, because of practical considerations, will have to sell them.[133] The Second Circuit, in contrast, has applied the "forced seller" concept where, at the time on the trial the plaintiff has already sold securities.[134] Inconsistency arises also with respect to the lack of analytical precision respecting the application of the purchaser-seller requirement. The Supreme Court analyzed the merger situation in terms of the conduct of the shareholder in approving or disapproving the merger without questioning the validity of the analysis used by the circuits which focused on the statutory definition of purchase and sale.[135] As a result of the conflict among the circuits, a definitive answer as to who has a right to bring a private action under Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder is lacking. The Supreme Court should remedy this situation.

An abandonment of the purchaser-seller requirement in an action for damages should not be the remedy, however. Rather, it is submitted that a consistent and flexible application of the *Birnbaum* rule is more desirable. Its effect would be to grant relief to those whom Rule 10b-5 was meant to protect. Correlatively, the continued application of the rule would provide a sifting device for precluding cases that should not be brought under Rule 10b-5. As Circuit Judge Hand held in *Birnbaum*, Rule 10b-5 extends protection "only to the defrauded purchaser or seller."[136] For the past twenty-two years, since *Birnbaum* has been adjudicated, courts have been expounding upon and clarifying the meaning of the terms purchaser and seller under Rule 10b-5. The reason that conflict exists among the circuits is that the extent of flexibility has not been defined and the Supreme Court has failed to resolve the issue explicitly. Is the Second Circuit's application of the "forced seller" concept correct, or does the Third Circuit correctly interpret the concept?[137] Is the Ninth Circuit's analysis of the standing requirement justified, or should the line be drawn short of allowing identifiable offerees standing to sue under Rule 10b-5?[138] A definitive response to these questions would resolve the conflict among the circuits and enhance the stability that has been gained through twenty-two years of case law.

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133. Landy v. Federal Deposit Insurance Corp., 486 F.2d 139, 159 (3d Cir. 1973).
134. Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 798 (1969).
135. *See* notes 78-88 and accompanying text *supra*.
136. Birnbaum v. Newport Steel Corp., 193 F.2d 461, 464 (1952).
137. *See* notes 128-29 and accompanying text *supra*.
138. *See* notes 44-69 and accompanying text *supra*.

ILLEGITIMACY IN PENNSYLVANIA

INTRODUCTION

> Illegitimacy . . . continues to strike a discordant and jarring note in our society. It is regarded as the fruit of a union of shame, irreverance and depravity. We have not yet achieved that sophistication or charity which would allow us to understand and deal with this problem without passion. Indeed our wrath has most often been visited not upon those who have violated our ethical and moral codes, but rather upon the blameless child.[1]

The history of society's treatment of the illegitimate child[2] is a history of maltreatment frequently punctuated by insensitivity at best and more often an unrelenting vengeance. Society designated the illegitimate by the term bastard which soon became a term of contempt; and a bastard was likened to a thief, beggar or prostitute.[3] Illegitimates have been referred to as an "unfortunate class of men" and at common law the illegitimate child was a *filius nullius* who could inherit nothing.[4] Because the act creating the illegitimate child was viewed as immoral, the illegitimate was perceived as immoral and inferior, and the legal liabilities imposed upon the illegitimate child were society's method of imposing vindictive punishment.[5] The public policy of fostering marriage and legitimacy has been cited by the courts to attempt to justify the vindictive treatment of the innocent child of the illicit affair,[6] yet one must question the deterrent effect of punishing the child rather than the parent. Certainly in today's society the stigma attached to being illegitimate should have decreased as enlightenment increased; but the stigma fades slowly.

> The origin of the distinction between legitimate and illegitimate children is perhaps not so remarkable, in view of Christian doctrines of marriage, as is the tenacity with which the distinction has persisted in our law and customs.

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1. Commonwealth v. Rozanski, 206 Pa. Super. 397, 400-01, 213 A.2d 155, 157 (1965).
2. *See* 1 J. REED, PENNSYLVANIA BLACKSTONE 238 (1831):
   [An illegitimate child is defined to be a child] not only begotten, but born out of lawful matrimony.
3. *See* Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 215 (1939).
4. *See* 1 J. REED, PENNSYLVANIA BLACKSTONE 242 (1831).
5. *See* Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 215, 223 (1939).
6. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 162 (1968).

> At times it seems that the stigma which accompanies illegitimacy is greater today than in the Middle Ages.[7]

Judicial recognition of the inherent unfairness of the legal liabilities imposed upon the illegitimate child probably explains the judicial policy of holding a child to be legitimate whenever possible.[8] If the real reasons for the vindictive treatment of the illegitimate are to foster marriage and legitimacy then certainly today the punishment of the illegitimate child should be seen as ineffective in achieving these goals, and society instead should impose its sanctions upon the parents who engage in the illicit act. The fact that no such change has occurred is fairly persuasive evidence that these justifications offered for the sanctions imposed upon the illegitimate are illusory and fictitious. The sanctions must instead be based upon some other and less noble reasoning. The most likely reasons seem to be historical prejudice[9] and the desire to prevent dilution of the putative father's[10] present and future estate by preventing the illegitimate child from inheriting from his father. The putative father does have some legal liabilities but it is significant that the liabilities primarily affect the father who acknowledges his paternity and wants to be a parent to his illegitimate child rather than the father who attempts to avoid responsibility.[11]

This article will examine and analyze the rights, duties and liabilities of the illegitimate child, the natural mother of the illegitimate child, and the putative father in Pennsylvania. The importance of this area of the law has greatly increased because the incidence of illegitimate births in the United States has risen greatly

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7. H. CLARK, LAW OF DOMESTIC RELATIONS 155-56 (1968).

8. Fitzpatrick v. Miller, 129 Pa. Super. 324, 329, 196 A. 83, 86 (1938). The presumption that the child of a married woman is legitimate is covered more fully in notes 114-116 and accompanying text *infra*.

9. *See* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 498 (1967). *See* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971) for an excellent discussion of society's treatment of the illegitimate. For a discussion of the treatment accorded illegitimates in other nations, see Krause, *Bastards Abroad—Foreign Approaches to Illegitimacy*, 15 AM. J. COMP. 726 (1966-67).

10. State v. Nestaval, 72 Minn. 415, 75 N.W. 725 (1898). The court defined a putative father to be the alleged or supposed father of an illegitimate child.

11. The skeptical view which courts have toward putative fathers who demonstrate a desire to assume parental duties is illustrated in notes 28 and 29 and accompanying text *infra*. Other articles dealing with the rights, duties and liabilities of the putative father include Lasok, *Legal Status of the Putative Father*, 17 INT. & COMP. L.Q. 634 (1968); Lippert, *Need For a Clarification of the Putative Father's Legal Rights*, 8 J. FAM. L. 398 (1968); Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231 (1971).

in recent years.[12] The possible effect of the equal protection and due process clauses of the fourteenth amendment will not be discussed in great detail due to the exhaustive examination already accorded these areas in other articles.[13]

I. CUSTODY

A. *Existing Pennsylvania Law*

When a child is born to a mother who is not married to the father, great problems can arise in the legal determination of who shall receive custody of the child. The decisive factor which guides the courts of this Commonwealth in child custody proceedings is the "best interests of the child" test.[14] In deciding in whose custody the best interests of the child will be furthered most effectively, the court considers the child's physical, intellectual, moral, spiritual and emotional well-being.[15] Interestingly the dissenting opinion in one Pennsylvania case argued that the best interests of the child are best protected by awarding custody to a third party based on the fact that the child's illegitimate origin will remain a secret if the child lived with this third party.[16] However, the majority view states that the best interests of the child determination is a factual determination which will depend upon the unique factual situation of each case.[17] Having formulated the

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12. H. CLARK, LAW OF DOMESTIC RELATIONS (1968):
> The rate of illegitimate births in the United States per thousand unmarried women between the ages of fifteen to forty-four has trebled between 1940 and 1960.

Id. at 156.

What effect the more liberal abortion laws and the greater availability of contraceptive devices will have upon the incidence of illigitimate births is uncertain at the present time. For an excellent discussion of the causes of the high incidence of illegitimate births, see *Proposals For Change in Pennsylvania's Treatment of the Illegitimate*, 29 U. PITT. L. REV. 566 (1968).

13. *See, e.g.*, Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Marcus, *Equal Protection: Custody of the Illegitimate Child*, 11 J. FAM. L. 1 (1971); Schafrick, *Emerging Constitutional Protection of the Putative Father's Parental Rights*, 7 FAM. L.Q. 75 (1973); Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231 (1971).

14. *See, e.g.*, Commonwealth *ex rel.* Children's Aid Soc'y v. Gard, 362 Pa. 85, 93, 66 A.2d 300, 305 (1949); *In re* Hawthorne, 146 Pa. Super. 20, 22, 21 A.2d 521, 523 (1941). In determining a custody dispute between the parents of a child the courts are required by PA. STAT. ANN. tit. 48, § 92 (1965) to base their decision upon the fitness of the parents and the welfare of the child.

15. *See, e.g.*, Commonwealth *ex rel.* Holschuh v. Holland-Moritz, 448 Pa. 437, 444, 292 A.2d 380, 383 (1972); Commonwealth *ex rel.* Lovell v. Shaw, 202 Pa. Super. 339, 340, 195 A.2d 878, 879 (1963); Commonwealth *ex rel.* Kuntz v. Stackhouse, 176 Pa. Super. 361, 364, 108 A.2d 73, 74 (1954).

16. Commonwealth *ex rel.* Children's Aid Soc'y v. Gard, 263 Pa. 85, 100, 66 A.2d 300, 307 (1949) (dissenting opinion). If this factor of keeping the child's illegitimate origin a secret is a consideration used by other courts in custody proceedings the courts do not include it in their written opinions.

17. *See, e.g.*, Commonwealth *ex rel.* McKee v. Reitz, 193 Pa. Super. 125, 128, 163 A.2d 908, 911 (1960).

"best interests of the child" rule the courts proceeded in the best of judicial traditions to carve out of the rule certain exceptions. These exceptions are stated in the form of assumptions that the "best interests of the child" will be furthered by a judicial preference for certain specific groups involved in custody proceedings such as natural parents or mothers.[18] In a custody proceeding between a natural parent and a third party, the natural parent has a prima facie right to the custody of his or her child as against the third party.[19] This judicial preference for the natural parent seems to be a valid exception to the "best interests of the child" rule since maintenance of the family unit as the basic social unit in our society is an important state interest which the courts should protect. The court in *Commonwealth ex rel. Martino v. Blough* explains the validity of this judicial preference for the natural parents:

> [W]ithout detracting from the virtue of the principle [that the welfare of the child is the prime concern in child custody disputes] we must warn that it is not without limitation in its application. If this principle were universally applied, any person who by religion, morals, education, love, understanding and social and economic status was "better" than the person who had custody of a child could obtain custody of that child by a habeas corpus proceeding, and the best person could obtain custody of any of our children.[20]

This right of the parents to the custody of their child is a natural right[21] resulting from the parental duty to support the child,[22] but is not uncontrollable or inalienable.[23] The parental right to custody, based upon the assumption that the child's best interests will normally be furthered by awarding custody to the parents, can be forfeited through parental misconduct which substantially and adversely affects the child's welfare.[24]

In a custody proceeding between the two parents the mother has a prima facie right to the custody of her child.[25] This mater-

18. Commonwealth *ex rel.* Holschuh v. Holland-Moritz, 448 Pa. 437, 444, 292 A.2d 380, 383 (1972) (natural parents); Commonwealth *ex rel.* Logue v. Logue, 194 Pa. Super. 210, 215, 166 A.2d 60, 64 (1960) (mothers).

19. Commonwealth *ex rel.* Holschuh v. Holland-Moritz, 448 Pa. 437, 444, 292 A.2d 380, 383 (1972).

20. 201 Pa. Super. 346, 349, 191 A.2d 918, 919 (1961).

21. Commonwealth v. Wormser, 260 Pa. 44, 46, 103 A. 500, 501 (1918).

22. Nangle v. Yoho, 172 Pa. Super. 629, 633, 95 A.2d 341, 343 (1953).

23. Commonwealth *ex rel.* Children's Aid Soc'y v. Gard, 362 Pa. 85, 95, 66 A.2d 300, 305 (1949) (not uncontrollable); Commonwealth v. Wormser, 260 Pa. 44, 46, 103 A. 500, 501 (1918) (not inalienable).

24. *Id.*

25. Commonwealth *ex rel.* Holschuh v. Holland-Moritz, 448 Pa. 437,

nal right to custody of the child imposes upon the mother the duty to support and maintain the child.[26] This mother-child relationship which the courts protect is not in the nature of a blood relationship but is the relationship which develops as a result of the association of the child and the mother during the child's early years.[27] In the case of the mother of an illegitimate child there is a more practical reason for selecting her as the person to have custody, because:

> [I]n almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood.[28]

An additional reason for preferring the mother in custody disputes is expressed in the dissenting opinion in *Stanley v. Illinois:*

> [A] state is fully justified in concluding on the basis of common human experience that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter . . . . Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.[29]

If the child is of tender years[30] the presumption that the interests of the child are normally best served by awarding custody to the natural mother, applies even more strongly than when the child is older.[31] This presumption of even greater maternal need is called the doctrine of tender years.

In order for the father to overcome the presumption in favor of the mother in custody disputes the father must prove not only that the mother is unfit to have custody but also that the award of cus-

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444, 292 A.2d 380, 383 (1972) which holds that the mother's prima facie right to custody of her child is one of the strongest presumptions in the law. The mother of a child also has a prima facie right to its custody above that of the paternal grandfather. Commonwealth v. Fee, 6 S. & R. 255, 257 (Pa. 1820).

26. *In re* Hawthorne, 146 Pa. Super. 20, 21, 21 A.2d 521, 522 (1941).

27. Commonwealth *ex rel.* Cleary v. Weaver, 14 Pa. D. & C.2d 715, 717 (C.P. Clin.), *aff'd*, 188 Pa. Super. 197, 146 A.2d 374 (1959).

28. Stanley v. Illinois, 405 U.S. 645, 665 (1972) (dissenting opinion).

29. *Id.*

30. Commonwealth *ex rel.* Doberstein v. Doberstein, 201 Pa. Super. 102, 106, 192 A.2d 154, 156 (1963). A child is of tender years if it is young, but rather than arbitrarily setting a maximum age limit the courts use the child's intelligence and age development to determine if the child is of tender years.

31. Commonwealth *ex rel.* Rainford v. Cirillo, 222 Pa. Super. 591, 596, 296 A.2d 838, 840 (1972).

tody of the child to him is in the best interests of the child.[32] The courts require little proof from the natural mother that she is qualified to have custody of her child other than an expression of desire on her part to retain the child, because she is assumed to be qualified unless the father can prove her unfit by demonstrating "gross, inexcusable neglect, coupled with evidence of unconcern and irresponsibility."[33] Other courts in describing what the father's evidence must prove, have stated that the presumption for the mother can be overcome only in the most extreme of circumstances,[34] by proof of abandonment by the mother,[35] or if compelling reasons appear.[36] The courts have never specifically stated what will be considered a "compelling reason" because the unique facts of each case must be determinative,[37] however, the courts have made definitive statements that certain maternal traits or conditions in the mother's home will *not* be deemed compelling and, therefore, will not overcome the presumption in favor of the mother.[38]

The mother's past behavior can be introduced as evidence of unfitness but the judicial determination of the mother's fitness or unfitness will be made based on the court's perception of the mother's present fitness as a parent.[39] There have been a few cases where the father or a third party has been able to prove the mother unfit but the burden of proof imposed upon the party op-

32. Commonwealth *ex rel.* Kevitch v. McCue, 165 Pa. Super. 49, 51, 67 A.2d 582, 583 (1949). If the child is of tender years the father's burden is even greater.

33. *In re* Adoption of Austin, 426 Pa. 441, 443, 233 A.2d 526, 527 (1967).

34. Commonwealth *ex rel.* Holschuh v. Holland-Moritz, 448 Pa. 437, 444, 292 A.2d 380, 383 (1972).

35. *In re* Hawthorne, 146 Pa. Super. 20, 22, 21 A.2d 521, 522 (1941). The court found that the mother had forfeited all rights to custody of the child by leaving the child with a third party, failing to support the child and acting immorally.

36. Commonwealth *ex rel.* Holschuh v. Holland-Moritz, 219 Pa. Super. 402, 403-04, 281 A.2d 729, 730 (1971).

37. *See, e.g.*, Commonwealth *ex rel.* McKee v. Reitz, 193 Pa. Super. 125, 128, 163 A.2d 908, 911 (1960).

38. Commonwealth *ex rel.* Lucas v. Kreischer, 450 Pa. 352, 355-56, 299 A.2d 243, 245 (1973) (interracial marriage); Commonwealth *ex rel.* Logue v. Logue, 194 Pa. Super. 210, 216-17, 166 A.2d 60, 62 (1960) (mother having to work, father's higher standard of living); Commonwealth *ex rel.* Pressens v. Seigler, 167 Pa. Super. 598, 602, 76 A.2d 454, 456 (1950) (meritricious relationship between natural mother and putative father); Commonwealth *ex rel.* Lewis v. Tracy, 155 Pa. Super. 257, 260, 38 A.2d 405, 406 (1944) (mother snatching child away from school); Commonwealth *ex rel.* Yeakley v. Boyer, 13 Pa. D. & C. 128 (C.P. Berks 1929) (mother's poor circumstances).

39. Commonwealth *ex rel.* Ruczynski v. Powers, 206 Pa. Super. 415, 420, 212 A.2d 922, 925 (1965).

posing the mother is so formidable[40] that it can seldom be met. However, at least one court held that the presumption for the mother should not be extended further than circumstances require and awarded custody of the children to the natural father rather than to his divorced wife.[41] The foster parents prevailed against the mother in another case where the court held that the poor condition of the child while in the natural mother's care, the fact that the natural mother had twice relinquished control, and her past treatment of the child required a finding of unfitness on the part of the mother.[42] The Pennsylvania Supreme Court, in affirming this superior court decision, felt that the finding of unfitness was valid due to the child's poor condition when in the natural mother's care.[43]

In *Commonwealth ex rel. Rainford v. Cirillo* the court found the mother to be unfit to have custody of her illegitimate children and awarded custody to the putative father.[44] The mother's moral character, emotional instability, and her adverse effect upon the children were contrasted by the court with the father's positive influence upon the children. The *Rainford* case illustrates that a father of illegitimate children can prevail over the mother in a custody dispute, but in considering the evidence which a father must present in order for a court to find the mother unfit, his chances of gaining custody, if the mother chooses to contest his claim for custody, seem very remote in Pennsylvania.

One factor which a court will consider in a custody proceeding is a child's preference for a person other than the mother, but such a preference will not be given much weight if the child is of tender years.[45] Because there is no specific age when a child is held

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40. *See* notes 34-36 and accompanying text *supra*.

41. Commonwealth *ex rel.* Buell v. Buell, 186 Pa. Super. 468, 471, 142 A.2d 338, 340 (1958).

42. Commonwealth *ex rel.* Ruczynski v. Powers, 206 Pa. Super. 415, 421, 212 A.2d 922, 924-25 (1965).

The dissenting opinion would have upheld the presumption that the mother should receive custody despite the strong evidence that the child's interests would be better served by awarding custody to the foster parents.

43. Commonwealth *ex rel.* Ruczynski v. Powers, 421 Pa. 2, 5, 219 A.2d 460, 461 (1966).

The factors which the court emphasized in finding the natural mother unfit were that the child was in such an untidy, emaciated condition, was untrained in hygiene and could only speak his own name while in the mother's care. The court also considered the fact that the mother had been employed in a house of lewd behavior.

44. 222 Pa. Super. 591, 597, 296 A.2d 838, 841 (1972).

The court cited the mother's unexplained trips to New York City to earn money, the fact that the mother had gotten pregnant out of wedlock a second time, the fact that the mother had not visited her children in almost a year and the apparent psychological harm she had caused the children as the reasons for the finding that the mother was unfit and awarding custody of the child to the father.

45. Commonwealth *ex rel.* Doberstein v. Doberstein, 201 Pa. Super. 102, 106, 192 A.2d 154, 156 (1963).

to be no longer of tender years the trial judge has great discretion in determining how much weight to give to a child's preference.[46] In *Commonwealth ex rel. Lovell v. Shaw* the child of tender years preferred her paternal grandparents because she had lived with them for four years and two months, but the court still upheld the presumption for the natural mother.[47] If the child is no longer of tender years then his preference will receive more weight since the father is presumed to be needed more by a child not of tender years.[48]

Occasionally a court will award custody to a person other than the mother without finding the mother unfit. In *Commonwealth ex rel. Mitchell v. Mitchell* the court applied the "best interests of the child" test and mentioned the presumption in favor of the mother, but did not apply the presumption, awarding custody of the child to the father based on the fact that the father's country home was a better environment in which to live than was the mother's city apartment.[49] Never in this decision did the court declare the mother to be unfit. In *Commonwealth ex rel. Holschuh v. Holland-Moritz* the environment of the mother's home was declared to be such that the child's welfare would not be promoted and the court awarded custody to a person other than the mother without finding the mother to be unfit.[50] The *Mitchell* and *Holschuh* courts used the "best interests of the child" test to determine who should receive custody of the child without use of the presumption in favor of the mother. These two cases have not been followed, however, and in neither case was the child illegitimate. In one case, however, a court awarded custody of an illegitimate child to the father rather

46. *See* note 30 *supra* which indicates the factors a trial judge should use in determining if a child is of tender years.

47. 202 Pa. Super. 339, 344, 195 A.2d 878, 880 (1963).

48. Commonwealth *ex rel.* Logue v. Logue, 194 Pa. Super. 210, 216, 166 A.2d 60, 64 (1960). The court held that where children were seven and nine years old the doctrine of tender years applies regardless of the children's preference but when the children were no longer of tender years their preference becomes important.

This court mentions the possible use of the "economic benefit" test if the tender years doctrine no longer applies. The determination of custody using this test is based upon the premise that the child's interests normally will be served best by awarding custody to the parent who can best supply the child's economic needs until emancipation. No other case was found in which this test was used. It seems wise that this test is not often used because the economically superior person is not necessarily the better person to have custody of a child. Even after the tender years, love and parental guidance are required more by a child than are money and material goods.

49. 186 Pa. Super. 347, 352, 142 A.2d 304, 306 (1958).

50. 219 Pa. Super. 402, 404, 281 A.2d 729, 730 (1971).

than allowing the child to be adopted, which was what the mother desired, without finding the mother unfit.[51] This case, however, is not a precedent for allowing a father to have custody instead of the mother without a finding that the mother is unfit because the mother in this case was not seeking custody for herself.

When the natural mother is dead the putative father of an illegitimate child has a prima facie right to custody of the child over all other persons.[52] This is true even though the putative father is not legally related to his illegitimate child.[53] The putative father's right to custody is forfeited, however, if the court decides the father is not suitable to have custody.[54]

> As to legitimate children the general rule is that the father, if suitable, is entitled to their custody, because of his obligation to maintain and educate them. And his legal right to custody, care, and companionship of his child, though not absolute . . . will not be interfered with except for the most substantial reasons affecting the child's welfare. Essentially the same principles apply to the right of a father to the custody of his illegitimate child.[55]

The father of a legitimate child has a prima facie right to custody as against all persons except the child's mother due to his obligation to support and educate the child.[56] Although a putative father has no such legal duty unless forced upon him by a support order of a court, the courts in custody proceedings will give great weight to whether or not the putative father made support payments to his illegitimate child prior to the mother's death.[57] The criterion of "suitability," applied to the father, is similar to the criterion of fitness which the courts apply to the mother to determine if she should retain or receive custody of her child. The courts feel the natural relationship between the putative father and the illegitimate child is important and should only be disturbed if substantial factors adversely affecting the welfare of the child

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51. *In re* Ziegler's Adoption, 59 Lanc. Rev. 239 (Pa. C.P. 1964). The court allowed the father to intervene in the adoption proceeding and awarded custody to him, despite the mother's desire that the child be adopted. The court emphasized how well qualified the father was to receive custody.

52. Appeal of Pote, 106 Pa. 574, 581 (1884); Commonwealth *ex rel.* Human v. Hyman, 164 Pa. Super. 64, 66, 63 A.2d 447, 448 (1949); Harper v. Fuller, 142 Pa. Super. 98, 99, 15 A.2d 518, 519 (1940).

53. Commonwealth *ex rel.* Kevitch v. McCue, 165 Pa. Super. 49, 51, 67 A.2d 582, 583 (1949). The father is not related to his illegitimate child for the purposes of descent either. PA. STAT. ANN. tit. 20, § 2107 (Supp. 1972).

54. Harper v. Fuller, 142 Pa. Super. 98, 99, 15 A.2d 518, 519 (1940).

55. Commonwealth *ex rel.* Human v. Hyman, 164 Pa. Super. 64, 65-66, 63 A.2d 447, 448 (1949).

56. Commonwealth *ex rel.* Rockey v. Hoffman, 91 Pa. Super. 213, 214 (1927).

57. Harper v. Fuller, 142 Pa. Super. 98, 100, 15 A.2d 518, 519 (1940); *cf.* Commonwealth *ex rel.* Human v. Hyman, 164 Pa. Super. 64, 65, 63 A.2d 447, 448 (1949).

are present.[58]

Although the courts give preference to natural parents in any custody proceeding, the parent's relationship with his child is a status, not a property right.[59] This status is protected by the courts if possible, but the courts, as the representatives of the Commonwealth, have a primary duty to protect the best welfare of the child.

> An infant is the ward of the state and the latter may take custody of the child away from even its own parents when the welfare of the child so demands. When a child is treated cruelly or is exposed to immoral or debasing conditions or is being neglected to its detriment, it is the right and duty of the state, acting through its courts, to transfer the child's custody to persons who will treat the child in such a manner as to foster its well being and promote its health and happiness.[60]

The interest of the Commonwealth in the child's welfare does not terminate when custody is awarded to one of the parties, because a custody order is always temporary and the order may be withdrawn and custody awarded to another, if the child's best interests will be furthered by such a change.[61]

The questions of support and custody are always separate and distinct[62] and the Uniform Reciprocal Enforcement of Support Act cannot be used to determine custody of a child.[63] Private agreements between parents or between a parent and a third person are not binding on the courts and the courts will award custody in the same manner as if there was no such agreement.[64]

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58. Commonwealth *ex rel.* Human v. Hyman, 164 Pa. Super. 64, 67, 63 A.2d 447, 448 (1949).

59. Commonwealth *ex rel.* McKee v. Reitz, 193 Pa. Super. 125, 128, 163 A.2d 908, 910 (1960); Commonwealth *ex rel.* Voltz v. Voltz, 168 Pa. Super. 51, 76 A.2d 464 (1950); *In re* Hawthorne, 146 Pa. Super. 20, 22, 21 A.2d 521, 522 (1941); *In re* Rosenthal, 103 Pa. Super. 27, 32, 157 A. 342, 344 (1931).

60. Commonwealth *ex rel.* Children's Aid Soc'y v. Gard, 362 Pa. 85, 92, 66 A.2d 300, 304 (1949); *In re* Hawthorne, 146 Pa. Super. 20, 22, 21 A.2d 521, 523 (1941).

61. Commonwealth *ex rel.* Thomas v. Gillard, 203 Pa. Super. 95, 99, 198 A.2d 377, 379 (1964).

62. Commonwealth v. Mexal, 201 Pa. Super. 457, 461, 193 A.2d 680, 682 (1963).

63. Commonwealth *ex rel.* Posnanskey v. Posnanskey, 210 Pa. Super. 280, 283, 232 A.2d 73, 75 (1967). *See* note 57 and accompanying text *supra* for the effect of a father's support on the court's determination of custody. Pennsylvania has adopted the Revised Uniform Reciprocal Enforcement of Support Act. PA. STAT. ANN. tit. 62, §§ 2043-1 to 42 (Supp. 1973).

64. Commonwealth *ex rel.* Rosenberg v. Passan, 45 Luz. L. Reg. 171, 172 (Pa. C.P. 1955).

A person desiring custody of a child presently in the custody of another can institute a habeas corpus proceeding in which the courts determine which party shall get custody based on the child's welfare, not on the rights of the parties.[65] An appeal from the lower court decision in a habeas corpus proceeding involving custody of a child receives the broadest possible scope of review notwithstanding recent statutory changes.[66] However, even though the scope of review is broad, the lower court's decision is given great weight and will be reversed only if there has been a gross abuse of discretion.[67]

B. *Analysis and Possible Alternatives*

It is submitted that the "best interests of the child" rule is a valid test to use in custody cases involving illegitimate children. The judicial presumption, that awarding custody to the natural parent or parents will be in the best interests of the child, unless the parent is unfit or unsuitable, can also be justified as a valid method to promote the state's interest in maintaining the integrity of the family unit. However, in applying this assumption, the courts should hold the natural parents to a higher standard of conduct since passing the present judicial tests of fitness and suitability requires little more than an assertion by the natural parent that he or she desires the custody of the child.[68] The policy of promoting the integrity of the natural family unit should be balanced against the state's interest in having children in the custody of qualified persons. By holding the natural parents to a higher standard than is now required, the courts of the Commonwealth could better carry out their duty of ensuring that the person awarded custody is qualified to assume parental duties and properly guide and develop the child.

The presumption that the mother has a prima facie right to custody as against all the world including the putative father, is more difficult to justify because the custody dispute is not be-

65. Commonwealth *ex rel.* Horisk v. Horisk, 90 Pa. Super. 400, 403 (1927); Commonwealth *ex rel.* Herman v. Herman, 10 Lebanon 159, 160 (Pa. C.P. 1964).

66. Commonwealth *ex rel.* Holschuh v. Holland-Moritz, 448 Pa. 437, 443, 293 A.2d 380, 383 (1972). Despite PA. STAT. ANN. tit. 12, § 1907 (Supp. 1973), appeals from habeas corpus decisions involving custody of a child will continue to be granted the broadest possible scope of review.

67. Commonwealth *ex rel.* Rainford v. Cirillo, 222 Pa. Super. 591, 598, 296 A.2d 838, 841 (1972). The lower court's ruling is given great weight because the parties' attitudes and sincerity are so important in determining the fitness and suitability of persons requesting custody of a child and the lower court is in the best position to evaluate these factors.

68. Commonwealth *ex rel.* Ruczynski v. Powers, 206 Pa. Super. 415, 212 A.2d 922 (1966); Commonwealth *ex rel.* Lovell v. Shaw, 202 Pa. Super. 339, 195 A.2d 878 (1963). These cases illustrate how little a parent has to possess in parental qualifications in order to receive custody of his or her child.

tween a parent and a third person trying to take the child away from his natural family unit but is between two natural parents. The justification that the presumption for the mother expedites custody proceedings is a questionable justification in light of the following statements in *Stanley v. Illinois:*

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.[69]

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency."[70] The constitutional question of equal protection will be discussed later in this article in reference to whether the mother's prima facie right to custody violates the father's right to equal protection guaranteed by the fourteenth amendment. In prior periods the presumption for the mother was probably a valid judicial method of protecting the welfare of the child. Today, with more women working away from home and with the difference in the roles of men and women not as distinct as in the past, perhaps the time has come for a close judicial examination of the validity and utility of this presumption. A New York court in *Godinez v. Russo*[71] ruled that in custody proceedings between the parents of a child there should be no prima facie right to custody in either parent but the custody determination should be based solely on the "best interests of the child." Perhaps after a thorough examination of the basis for the presumption the courts or legislature of Pennsylvania will agree with the *Godinez* court

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69. 405 U.S. 645, 656-57 (1972).

70. *Id.* at 656; *accord*, Reed v. Reed, 404 U.S. 71, 76 (1971).

71. 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Westchester County Ct. 1966). The ruling in *Godinez* was rejected in *Roe v. Doe*, 58 Misc. 2d 757, 296 N.Y.S.2d 685 (New York County Ct. 1968). The Pennsylvania Legislature could enact a law stating that there shall be no prima facie right to custody in either parent of a legitimate or illegitimate child. N.Y. DOM. REL. LAW § 70 (McKinney 1964) states that,

> [i]n all cases there shall be no prima facie right to the custody of the [legitimate or illegitimate] child in either parent, but the courts shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness and make award accordingly.

The addition of the words "legitimate and illegitimate" in any Pennsylvania legislation will require the courts to eliminate the presumption in all custody proceedings.

and eliminate from the law of Pennsylvania the presumption for the mother.

II. SUPPORT

A. *Existing Pennsylvania Law*

In Pennsylvania the father of an illegitimate child has no common law duty to support his illegitimate child[72] nor do the paternal grandparents of an illegitimate child have any duty to support the child.[73] However, the maternal grandparents do have a duty to support their daughter's illegitimate child.[74] Support statutes have the purpose of requiring the father to support his illegitimate child to further the welfare of the child[75] and to prevent the illegitimate child from becoming a public charge.[76] At one time the Pennsylvania statutes concerning fornication,[77] bastardy[78] and child support by the father of an illegitimate child held that the father could not only be held liable for maintenance of the child[79] but also could be fined 10 pounds or given 21 lashes.[80] Today Pennsylvania has no fornication or bastardy criminal statutes[81] but

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72. Commonwealth v. Donnelly, 14 Pa. D. & C.2d 40, 42 (Q.S. Del. 1958). The court held that a father was only liable for support of his illegitimate child if liability is established under a support statute in a court.

The majority of the states hold that the father of an illegitimate has no common law duty to support his illegitimate child. *E.g.*, Montcrief v. Eby, 19 Wend. 405 (N.Y. 1838). However, Kansas holds that the father of an illegitimate does have a duty of support. Doughty v. Engler, 112 Kan. 583, 586, 211 P. 619, 621 (1923).

For an article discussing the issue of support for illegitimate children from their father, *see* 1 ST. MARY'S L.J. 146 (1969).

The duty of the father of a legitimate child to support his child has been held to be "well nigh absolute." Firestone v. Firestone, 158 Pa. Super. 579, 581, 45 A.2d 923, 924 (1946).

73. Commonwealth v. Campagna, 40 Pa. D & C. 478, 479 (C.C. Alleg. 1940).

74. *In re* McAllister, 31 Pa. D. & C. 4 (Q.S. Lanc. 1937).

75. Commonwealth v. Bertram, 143 Pa. Super. 1, 3, 16 A.2d 758, 759 (1940).

76. Commonwealth v. Campagna, 40 Pa. D. & C. 478, 483 (C.C. Alleg. 1940).

77. Fornication has been defined as unlawful carnal knowledge of a man with a woman. Commonwealth v. Stewart, 110 Pa. Super. 279, 283, 168 A. 528, 530 (1933).

78. Bastardy has been defined as unlawful carnal knowledge of a man with a woman resulting in the birth of a baby. Commonwealth v. Stewart, 110 Pa. Super. 279, 283, 168 A. 528, 530 (1933).

79. Act of January 12, 1705-6, 2 Statutes at Large 180, § VII [1705-6] (repealed 1860).

80. Act of January 12, 1705-6, 2 Statutes at Large 180, § III [1705-6] (repealed 1860).

81. Pennsylvania's fornication and bastardy statute, Act of Sept. 28, 1951, P.L. 1543, § 1 [1951] (repealed 1972) was not replaced in the new Pennsylvania Crimes Code.

For insight into how the problems of bastardy and support were approached in the past, *see* Helmholz, *Bastardy Litigation in Medieval England*, 13 AM. J. LEGAL HIST. 360 (1969) and for a discussion of the expand-

does have a statute making a father's failure to support his illegitimate child a misdemeanor of the third degree:

> A person is guilty of a misdemeanor of the third degree if he, being a parent neglects or refuses to contribute reasonably to the support and maintenance of a child born out of lawful wedlock, whether within or without this Commonwealth.[82]

A prosecution of the father for failure to support his illegitimate child may be instituted by "every person capable of taking an oath in a court of justice," because the offense is a misdemeanor.[83] The reason that failure to support was designated a misdemeanor with criminal penalties was to make support payments appear to be the wiser course for the father to follow, because the legislature recognized the inherent difficulty in enforcement of support orders.[84] If a father was convicted under the old fornication and bastardy law[85] and the support order has now lapsed, prosecution under the new statute for failure to support is not precluded even if the father complied fully with the previous support order.[86] If the father is convicted of failure to support his illegitimate child the court may either fine the father or direct the father to make support payments for the child's benefit to such person as the court may designate.[87] The amount of such payments depends on the circumstances of the case with emphasis upon the child's needs and the father's financial capacity.[88] The statute of limitations for prosecutions for failure to support is two years from the birth of the child unless within those two years the father

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ing rights of illegitimates in bastardy proceedings, *see* 34 OHIO S. L.J. 428 (1973).

82. PA. STAT. ANN. tit. 18, § 4323 (Supp. 1973). In this statute the phrase "child born out of lawful wedlock" means a child born when his father and mother were not lawfully married to each other regardless of whether the mother was married to some other man when the child was born. Commonwealth v. Shavinsky, 174 Pa. Super. 273, 275, 101 A.2d 178, 179 (1954).

83. Commonwealth v. Abell, 75 Pa. Super. 267, 268-69 (1920).

84. The fact that the failure to support statute is criminal rather than civil has in some cases made it more difficult to get support payments from a father who denies his paternity. This will be illustrated in the discussion in notes 101-113 and accompanying text *infra*.

85. Act of Sept. 28, 1951, P.L. 1543, § 1 [1951] (repealed 1972).

86. Commonwealth v. Pewatts, 200 Pa. Super. 22, 27, 186 A.2d 408, 410 (1963); Commonwealth v. Susanek, 88 Pa. Super. 428, 431 (1926).

87. PA. STAT. ANN. tit. 18, § 4323(c) (Supp. 1973). Such payments can be made retroactive to the date the information was brought. Commonwealth v. Shavinsky, 180 Pa. Super. 522, 529, 119 A.2d 819, 822 (1956).

88. PA. STAT. ANN. tit. 18, § 4323(c) (Supp. 1973). For procedures and grounds for release of the father from custody for failure to pay support payments, *see* PA. STAT. ANN. tit. 18, § 4322 (1972).

voluntarily contributed to the support of the child or acknowledged paternity in writing in which case the prosecution may be brought at any time within two years from the time of such acknowledgment or payment of such support.[89] Extradition can be used in criminal cases involving failure to support an illegitimate.[90]

In order for a man to be convicted of failure to support an illegitimate child his paternity must be admitted or proved.[91] Conversely, if the mother is married, non-access to her husband must be proved in order to rebut the strong judicial presumption of legitimacy.[92]

Child support includes the mother's "lying in" expenses[93] and the child's physical and educational needs.[94] The father's duty of support, however, does not include support for the mother.[95] At-

89. PA. STAT. ANN. tit. 18, § 4323(b) (Supp. 1973).

90. PA. STAT. ANN. tit. 19, §§ 191.1-.31 (1964). The Uniform Reciprocal Enforcement of Support Law, PA. STAT. ANN. tit. 62, §§ 2043-1 to 42 (Supp. 1973), can also be used as a method of enforcement of support orders.

91. Commonwealth v. Wibner, 73 Pa. Super. 349, 351 (1920).

92. Commonwealth v. Becker, 168 Pa. Super. 69, 70, 76 A.2d 657, 658 (1950); Commonwealth v. Barone, 164 Pa. Super. 73, 75, 63 A.2d 132, 134 (1949); Commonwealth v. Kerr, 150 Pa. Super. 598, 603, 29 A.2d 340, 343 (1943).

Discussion of the evidence required to prove paternity, the possible defenses of the alleged father and the procedure involved in the criminal proceedings for failure to support is beyond the scope of this article. For discussion of these areas, *see* Harris, *Some Observations on the Un-Uniform Act on Blood Tests to Determine Paternity*, 9 VILL. L. REV. 59 (1965); 29 U. PITT. L. REV. 559 (1968); 68 DICK. L. REV. 90 (1963).

The foreign approach to the common defense of an alleged father, *exceptio plurium concubentium* (this defense alleges that more than one man had intercourse with the mother during the possible conception period), is to hold all possible fathers liable for support. Note, *Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859 (1966). In Pennsylvania the possibility of prosecution for fornication was a deterrent to a witness for the father testifying that he also had intercourse during the possible conception period. *See, e.g.*, Commonwealth v. Harbaugh, 201 Pa. Super. 360, 365, 191 A.2d 844, 847 (1963). However, this deterrent is nonexistent today because the fornication statute, Act of Sept. 28, 1951, P.L. 1543, § 1 [1951] (repealed 1972), was not replaced with a new statute in 1972.

The alleged father in *In re* Gross, 17 Pa. D. & C. 766 (Q.S. Cent. 1931) defended on the ground that even if he were the father he should not have to pay support because he was forced to pay a large amount of money to cure the venereal disease he had contracted from the mother. This unique defense, needless to say, was rejected by the court. *Id.* at 767.

93. Commonwealth v. Tritt, 4 Chest. 418, 420 (Pa. C.P. 1950). The lying in expenses include prenatal expenses and expenses of the birth of the child.

94. Commonwealth v. Gilmore, 97 Pa. Super. 303, 308 (1929).

Support may include college expenses if the child is able and willing to pursue a college education and the cost is not an undue hardship on the father. Commonwealth *ex rel.* Ulmer v. Gommerville, 200 Pa. Super. 640, 643, 190 A.2d 182, 184 (1963). For a discussion of college expenses as an element of support, *see* 67 DICK. L. REV. 200 (1963).

95. Commonwealth v. Donnelly, 14 Pa. D. & C.2d 40, 43 (Q.S. Del. 1958).

tempts by illegitimates to collect damages from their father in a cause of action for "wrongful life" have been unsuccessful.[96] An agreement between the father and mother that the father will support the illegitimate child is enforceable as a valid contract[97] and such an agreement is in accordance with the judicial policy of encouraging settlement.[98] However, agreements between parents that the father will not be liable for the support of the illegitimate child are not enforceable contracts because they are against public policy[99]

Pennsylvania law also permits a civil proceeding to be instituted against the alleged father to require support payments for the illegitimate child.[100] However, the practical effect of these statutes is largely restricted by the decision of the court in *Commonwealth v. Dillworth*[101] which held that if the alleged father denies paternity at the civil trial, the issue of paternity must be determined in a criminal proceeding in order to protect the alleged father's guarantee to a jury trial.[102] The lower court in *Dillworth* reasoned that the civil court should be permitted to make a determination of the issue of paternity when the alleged father denies paternity in order to carry out what the lower court believed to be the legislative intent in enacting the statute.[103] This reasoning that the legislature had manifested an intent to eliminate the father's right to a jury trial was rejected by the Pennsylvania Supreme

96. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963). For a discussion of "wrongful life" as a tort, *see* 112 U. PA. L. REV. 780 (1964); 2 DUQUESNE L. REV. 125 (1963).

97. Rohrheimer v. Winters, 126 Pa. 253, 257, 17 A. 606, 607 (1889) (such a support agreement is a valid contract and is not against public policy); Jordan's Estate, 64 Dauph. 14, 15 (Pa. O.C. 1953) (oral contract valid); Kaliszewski v. Weiss, 30 Erie 50, 51 (Pa. C.P. 1947). A subsequent support order by a court does not invalidate an agreement between the mother and father that the father will support the child.

For a discussion of support agreements between the mother and natural father, *see* 1970 L. & SOC. ORDER 641 (1970).

98. Rohrheimer v. Winters, 126 Pa. 253, 257, 17 A. 606, 607 (1889); Commonwealth v. Luciano, 205 Pa. Super. 397, 399, 208 A.2d 881, 883 (1965).

99. Commonwealth *ex rel.* Contino v. Contino, 72 Pa. D. & C. 550, 552 (M.C. Phila. 1949).

100. PA. STAT. ANN. tit. 62, §§ 2043-.31 to .40 (1968).

101. 431 Pa. 479, 246 A.2d 859 (1968).

102. PA. CONST. art. I, § 9.

103. Commonwealth *ex rel.* Miller v. Dillworth, 204 Pa. Super. 420, 423, 205 A.2d 111, 113 (1964). The Pennsylvania Supreme Court did not agree that the purpose of PA. STAT. ANN. tit. 62, §§ 2043.31-.40 (1968) would be nullified by requiring paternity to be proved in a criminal proceeding because a civil proceeding would be effective if the man admits paternity but refuses to pay support. Commonwealth v. Dillworth, 431 Pa. 479, 484, 246 A.2d 859, 862 (1968).

Court. Justice Roberts, in his concurring opinion in *Dillworth*, expressed the view that the court's decision did not prohibit the legislature from passing an act stating that there is no right to a jury determination of the issue of paternity[104] and that if the legislature manifests such a clear intent then the Pennsylvania Supreme Court could possibly hold this act to be valid.[105]

B. *Analysis of Dillworth*

The legislative purpose of the statutes[106] allowing a civil suit to be brought to obtain support payments for illegitimates seemingly was to establish a more efficient civil process for obtaining support.[107] However, the Pennsylvania Supreme Court felt the statutes did not clearly manifest such an intent and restricted the situation in which the civil proceedings can be utilized.[108] Since the *Dillworth* case no legislative action to clarify the intent of the support statutes allowing civil suit has occurred. The combined effect of the *Dillworth* decision and legislative inaction has been to give to the irresponsibile father of the illegitimate an excellent method by which to delay and sometimes avoid entirely his responsibility to support his illegitimate child.[109] The alleged father who actually is not the father of the illegitimate child receives little if any practical benefit from the *Dillworth* decision that a jury trial is required to determine the paternity issue.[110]

A 1971 decision by the Pennsylvania Superior Court[111] diluted

104. 431 Pa. 479, 486, 246 A.2d 859, 863 (1968).

105. *Id.* at 491, 246 A.2d at 864.

106. PA. STAT. ANN. tit. 62, §§ 2043.31-.40 (1968).

107. As Justice Musmanno pointed out in his dissenting opinion in Commonwealth v. Dillworth, 431 Pa. 479, 246 A.2d 859 (1968) the legislature recognized that there was a large backlog of cases pending under the criminal support statute, PA. STAT. ANN. tit. 18, § 4323 (Supp. 1973) (formerly Act of June 24, 1939, P.L. 872, § 732 [1939] (repealed 1972)), and enacted PA. STAT. ANN. tit. 62, §§ 2043.31-.40 (1968) in order to relieve this backlog and allow the illegitimate child to get support payments while he is still a child.

108. Commonwealth v. Dillworth, 431 Pa. 479, 484-85, 246 A.2d 859, 862 (1968).

109. *Id.* at 504, 246 A.2d at 872 (dissenting opinion). Justice Musmanno recognized that the majority's holding in this case would result in this undersirable effect.

This dissenting opinion contains an excellent synopsis and history of the law of support in Pennsylvania and is an excellent source for anyone interested in obtaining a general overview of how the support law of Pennsylvania developed.

110. The argument that the alleged father who is not actually the natural father of the child will fare better with a jury determination of his paternity than with a judge's determination of paternity is not substantiated by a survey published by the County Court of Philadelphia in 1962 concerning paternity determinations in Philadelphia. It was found in this survey that the paternity issue is more frequently decided against the father by a jury (92%) than by a judge (74%). Commonwealth *ex rel.* Miller v. Dillworth, 204 Pa. Super. 420, 427-28, 205 A.2d 111, 115 (1964).

111. Commonwealth v. Jacobs, 220 Pa. Super. 31, 36, 279 A.2d 251, 253 (1971). Thus an alleged father who wishes to contest his paternity but

the *Dillworth* decision somewhat by holding that a jury trial to decide paternity is only required if the alleged father demands a jury trial, and if he does not then the right is waived. The Pennsylvania Legislature could act to make the entire procedure for gaining support for an illegitimate child, including determination of the issue of paternity, a civil procedure.

"[C]omprehensive statutes establishing civil suits for the determination of paternity [should be enacted]. Nothing whatever is to be gained by the retention of the criminal forms, since enforcement of the support order by contempt achieves the same purpose."[112] Once paternity has been established and a support order issued the mother of the illegitimate child can sue in assumpsit for past due payments.[113]

III. LEGITIMATION

A. *Existing Pennsylvania Law*

> Sirrah, your brother is legitimate;
> Your father's wife did, after wedlock, bear him:
> And, if she did play false, the fault was hers . . . .[114]

Just as there was in Shakespeare's England, there is today in Pennsylvania a strong presumption that a child born to a married woman is legitimate.[115] This presumption of legitimacy may only be overcome by clear, direct, satisfactory and irrefragable proof to the contrary.[116]

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does not wish to risk the onus of a criminal conviction can waive his right to a jury trial and have the paternity issue resolved in a civil proceeding.

112. H. CLARK, LAW OF DOMESTIC RELATIONS 165 (1968). Examples of state statutes which have made paternity a civil issue include: CAL. CIV. CODE § 196(a) (West 1954); NEB. REV. STAT. § 13-111 (1954).

For a discussion of the difficulty in classifying bastardy proceedings as civil or criminal, *see* Wysong, *The Jurisprudence of Labels—Bastardy as a Case in Point*, 39 NEB. L. REV. 648 (1960).

For a discussion of possible revisions in existing state methods of handling bastardy problems, *see* 19 CLEV. ST. L. REV. 177 (1970).

113. Commonwealth v. Showalter, 31 Pa. D. & C. 588 (C.P. Lanc. 1938).

114. Shakespeare, *The Life and Death of King John*, in SHAKESPEARE, THE COMPLETE WORKS 548 (G.B. Harrison ed. 1952).

115. For a discussion of this presumption, *see* 9 DUQUESNE L. REV. 129 (1970).

116. Rosenberger's Estate, 362 Pa. 153, 161, 65 A.2d 377, 380 (1949); *In re* Thorn's Estate, 353 Pa. 603, 606, 46 A.2d 258, 260 (1946); Hamilton's Estate, 8 Pa. D. & C.2d 293, 296 (O.C. Phila. 1956). In Hamilton's Estate the mother was twenty-eight years old and her husband was eighty-two years old and the mother had been having an illicit affair with a younger man. However, in the absence of direct proof of non-access to her elderly husband the presumption of legitimacy was utilized by the court and the

Pennsylvania allows an illegitimate child to be legitimated by a marriage of the child's parents and cohabitation by the parents subsequent to this valid marriage.[117] Once legitimated the child possesses all the legal rights and duties of any other legitimate child.[118] Although the cohabitation requirement in the legitimation statute is mandatory, not merely directory,[119] the word "cohabit" has been given a liberal construction because legitimation of children is viewed with favor by the courts.[120] A common law marriage in another state is sufficient to legitimate the child in Pennsylvania.[121] If the marriage between the parents of a child is subsequently declared void the child will nevertheless be held to be the legitimate child of both parents.[122]

The law of the father's domicile, not the child's domicile, is the applicable law to use in determining the effect of any attempt by a father to legitimate his illegitimate child.[123] Therefore, attempts by a putative father whose domicile is Pennsylvania to legitimate his illegitimate child by acknowledgement are ineffective[124] because legitimation can only be accomplished by marriage and cohabitation.[125] However, an illegitimate child domiciled in Pennsylvania may be legitimated through acknowledgment by its father if acknowledgement is sufficient for legitimation in the father's domicile.

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child was held to be the legitimate child of its mother and her eighty-two year old husband.

117. PA. STAT. ANN. tit. 48, § 167 (Supp. 1973).

118. *Id.*

119. Sollinger's Estate, 40 Pa. Super. 3, 4 (1909). The Pennsylvania Legislature retained the cohabitation requirement in the recent legitimation statute, PA. STAT. ANN. tit. 48, § 167 (Supp. 1973), and thereby demonstrated that the purpose of the legitimation procedure in Pennsylvania is not only to legitimate the child but to establish a family unit composed of the natural mother, the natural father and the child. This legislative intent is explained in Sollinger's Estate, *supra.*

120. Commonwealth *ex rel.* Dittman v. Dittman, 174 Pa. Super. 599, 601, 101 A.2d 145, 146 (1954) (one night of cohabitation is sufficient); *In re* Agnew's Estate, 11 Pa. County Ct. 137 (O.C. Phil. 1892) (a few days of cohabitation is sufficient).

121. McCausland's Estate, 213 Pa. 189, 193, 62 A. 780, 781 (1906).

122. PA. STAT. ANN. tit. 48, § 169.1 (1965).

123. *In re* Thorn's Estate, 353 Pa. 603, 611, 46 A.2d 258, 262 (1946); Scallabrelli's Estate, 59 Pa. D. & C. 434, 435 (O.C. Dauph. 1947). H. Clark feels:

> [A] better solution would be to hold that if legitimation occurred either by the law of the parent's domicile, or by the law of the child's domicile, or by the law of the parent's domicile at his death the child's status is that of a legitimate child in all states.

H. CLARK, LAW OF DOMESTIC RELATIONS 161 (1968).

124. A statement in the will of a putative father calling an illegitimate child "my son" is not sufficient to legitimate the child. Wharton's Estate, 218 Pa. 296, 297-98, 67 A. 414, 415 (1907).

An acknowledgment of an illegitimate child by a father is insufficient for the purpose of legitimating a child. Scallabrelli's Estate, 59 Pa. D. & C. 434, 436 (O.C. Dauph. 1947).

125. PA. STAT. ANN. tit. 48, § 169.1 (1965).

A husband or a wife who is found guilty of the crime of adultery may not marry the paramour during the lifetime of the spouse of the wife or husband, but any child born to the wife will nevertheless be held to be the legitimate child of the wife and her husband.[126] If, however, the husband can prove non-access[127] then the child will be held to be illegitimate. Thus if the crime of adultery is proved against the wife and her husband can prove non-access then the child born to the wife cannot be legitimated under Pennsylvania law because the wife and natural father are forbidden from marriage[128] and acknowledgment is insufficient. However, if no charges of adultery are proved then the wife and putative father may marry if the wife obtains a divorce and their marriage and cohabitation will legitimate the child.[129] If the husband cannot prove non-access the presumption of legitimacy applies and the child is deemed to be the legitimate child of the mother and her husband.

For purposes of inheritance from the father, a marriage between the putative father and natural mother is sufficient to legitimate the child and no cohabitation is required in order for the child to inherit from the father as a legitimate child.[130]

B. *Alternatives*

Ohio has adopted an alternative method of legitimation[131] which seems to have several advantages. This statutory scheme allows a child to be legitimated by his father if three requirements are met:

1. The father files a written acknowledgment;
2. The court approves the acknowledgment using as the criterion the best interests of the child;
3. The natural mother consents to the child's legitimation.

This statutory scheme allows the father to legitimate the child without requiring a marriage between two persons who are possibly not compatible. Oregon eliminates the problems of legitimation by holding all children to be the legitimate children of their natural parents.[132] Under this statute the parent-child relation-

126. PA. STAT. ANN. tit. 48, § 169 (Supp. 1973).
127. *See* 29 U. PITT. L. REV. 559 (1968) for a discussion of non-access in Pennsylvania.
128. *See* note 126 and accompanying text *supra.*
129. Commonwealth *ex rel.* Meta v .Cinello, 217 Pa. Super. 94, 268 A.2d 135 (1970) illustrates such a factual situation.
130. PA. STAT. ANN. tit. 20, § 2107 (Supp. 1972).
131. OHIO REV. CODE ANN. § 2105.18 (Baldwin 1971).
132. ORE. REV. STAT. § 109.060 (1971).

ship is independent of the relationship between the parents. This type of statutory approach seems to be an excellent solution because the parents are required to accept the responsibilities of parenthood and the child is not punished for an illicit act in which he took no part. The Oregon statute does not eliminate the problems of proving paternity but once paternity is established the child born out of wedlock becomes the legitimate child of its natural father as well as its natural mother. It is submitted that either the Ohio or Oregon type statute should be considered by the Pennsylvania Legislature because it would impose legal sanctions upon the correct person, the father, and could help to eliminate the stigma[133] with which an illegitimate child must live.

Another alternative is a California type legitimation statute.[134] However, because this statutory scheme requires the father who is married to accept the child into his own family,[135] it is less effective in inducing the father to acknowledge his illegitimate child than the Ohio type statute[136] under which a child could be legitimated while remaining in the custody of the mother.

A California decision allowed prenatal legitimation by the father by reasoning that the primary interest of an illegitimate child is to be legitimated.[137] If the natural mother intends to retain custody of the child after birth this emphasis by the court seems valid because the child through legitimation becomes the legitimate child of his natural parents. However, if the mother intends to allow the child to be adopted then legitimation by the father becomes less important because through adoption the child will probably be placed with good parents and the child's ties with his natural parents will be severed.[138] Allowing prenatal legitimation in this situation could impede the adoption procedure because the father's consent is required in order for his legitimate child[139] to be adopted. To avoid such a situation the California courts require a mother's consent in order for the father to legitimate his child.[140] The United States Supreme Court's decision in *Roe v.*

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133. *See* notes 5-10 and accompanying text *supra*.

134. CAL. CIV. CODE § 230 (West 1954) permits legitimation by the putative father if he meets three requirements: public acknowledgment of paternity, treating the child as if it were legitimate and accepting the child into his family with the consent of his wife if he is married. There is an excellent discussion of this statute in Marcus, *Equal Protection: Custody of the Illegitimate Child*, 11 J. FAM. L. 1, 34-37 (1971).

135. Bryant v. Ellis, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (Dist. Ct. App. 1964).

136. OHIO REV. CODE ANN. § 2105.18 (Baldwin 1971).

137. Lavell v. Adoption Institute, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (Dist. Ct. App. 1960).

138. *See* notes 209-212 and accompanying text *infra*.

139. PA. STAT. ANN. tit. 1, § 411(3) (Supp. 1973).

140. Lavell v. Adoption Institute, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (Dist. Ct. App. 1960).

Wade[141] could cast serious doubt on the validity of any pre-natal legitimation prior to the third trimester.

C. *Artificial Insemination*

The relatively recent development of artificial insemination[142] as a method of inducing a pregnancy can cause novel questions concerning legitimacy and illegitimacy. Artificial insemination with the semen of a third party donor, A.I.D.,[143] has presented the courts with the difficult question of whether a child born as a result of A.I.D. is legitimate or illegitimate. A New York court in 1963 held that a child conceived by A.I.D., even though performed with the husband's consent, was illegitimate.[144] However, because the A.I.D. method of impregnation was utilized by the mother with the husband's consent the court, relying upon the theory of implied contract, held the husband liable to support the child.[145] In a recent decision,[146] another New York court held that a child conceived by means of A.I.D. was the legitimate child of the mother and her husband, if the husband's consent had been obtained prior to conception.[147] Because this recent New York case[148] was not distinguishable in any significant manner from the 1963 New York case[149] New York seems to lean toward holding a child conceived by means of A.I.D. with the husband's consent to be legitimate.

"The number of children conceived by A.I.D. is not known. It is sufficiently large, however, to require statutory protection of the children so conceived, because only by statute can their status be clearly and incontestably established."[150] Pennsylvania presently has no statute making children legitimate who are born as a result of A.I.D.[151]

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141. 410 U.S. 113 (1973). For a coverage of the effect of this decision *see* notes 174 and 175 and accompanying text *infra*.

142. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 157-58 (1968) for a discussion of artificial insemination.

143. *Id.* For a discussion of the effect of A.I.D. socially and legally upon today's society, *see* Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WISCONSIN L. REV. 849 (1965).

144. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963). This case is discussed in 30 BKLN. L. REV. 126 (1963).

145. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

146. *In re* Annonymous, 345 N.Y.S.2d 430 (Kings County Ct. 1973).

147. *Id.* at 435. The judicial policy of holding a child to be legitimate if possible supports this result.

148. *Id.*

149. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

150. H. CLARK, LAW OF DOMESTIC RELATIONS 158 (1968).

151. A possible statute to use as a guideline in adopting a Pennsyl-

IV. VISITATION RIGHTS

In 1965 the Pennsylvania Superior Court granted visitation rights to a putative father to allow visitation with his illegitimate child.[152] This holding expressly overruled an earlier decision in which the superior court had ruled that a putative father should never be granted visitation rights with his illegitimate child.[153] Before examining the reasoning of these two cases, an examination of Pennsylvania policy in reference to granting visitation rights to the father of a legitimate child is advisable.

A parent of a legitimate child is seldom denied visitation rights with his child and even failure of the father to support the child is not a ground for denial of visitation rights.[154] The basis for seldom denying visitation rights to a natural parent is that the child's welfare is usually furthered by free visitation by the parent not having custody.[155] The natural parent will be denied visitation with his child only if such visits will be detrimental to the best interests of the child[156] because the courts feel estrangement of the child from either natural parent affects the child adversely.[157] Such parental visits will be held to be detrimental to the child if the court feels the parent is unfit to associate with the child or if the parent has severe mental or moral deficiencies which are a grave threat to the child's welfare;[158]however, abandonment of the child is not a sufficient reason for denying a parent visita-

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vania statute on this subject is § 3(b), Proposed Uniform Act on Legitimacy in Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966). Such a statute was introduced in New York but was defeated. Gursky v. Gursky, 39 Misc. 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

152. Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965). For a general discussion of visitation rights of the putative father, *see* Harkins, *Putative Father's Visitation Rights*, 19 CLEVE. ST. L. REV. 549 (1970).

153. Golembewski v. Stanley, 205 Pa. Super. 101, 208 A.2d 49 (1965).

154. Commonwealth *ex rel.* Lotz v. Lotz, 188 Pa. Super. 241, 244, 146 A.2d 362, 363 (1958).

155. Commonwealth *ex rel.* Turner v. Strange, 179 Pa. Super. 83, 85-86, 115 A.2d 885, 886 (1955); Commonwealth *ex rel.* Boschert v. Cook, 122 Pa. Super. 397, 400, 186 A. 229, 230 (1936).

156. Commonwealth *ex rel.* Meta v. Cinello, 217 Pa. Super. 94, 95, 268 A.2d 135, 136 (1970).

157. Commonwealth *ex rel.* Lotz v. Lotz, 188 Pa. Super. 241, 244, 146 A.2d 362, 364 (1958); Commonwealth *ex rel.* Turner v. Strange, 179 Pa. Super. 83, 86-87, 115 A.2d 885, 886 (1955); Commonwealth *ex rel.* Brown v. Lane, 90 Pa. Super. 350, 352 (1927); Commonwealth *ex rel.* Manning v. Manning, 89 Pa. Super. 301, 305 (1926).

158. Commonwealth *ex rel.* Lotz v. Lotz, 188 Pa. Super. 241, 244, 146 A.2d 362, 363 (1958) (moral or mental deficiency); Commonwealth *ex rel.* Turner v. Strange, 179 Pa. Super. 83, 86, 115 A.2d 885, 886 (1955) (unfit to associate); Commonwealth *ex rel.* Heston v. Heston, 173 Pa. Super. 260, 262, 98 A.2d 477, 478 (1953) (mental or moral deficiency); Leonard v. Leonard, 173 Pa. Super. 424, 426-27, 98 A.2d 638, 639 (1953) (unfit to associate); Commonwealth *ex rel.* Bachman v. Bradley, 171 Pa. Super. 587, 593, 91 A.2d 379, 382 (1952) (undesirable influence).

tion rights.[159]

The courts feel so strongly that estangement is detrimental to a child, that, if a child refuses to see the parent granted visitation rights, some courts have compelled the person having custody of the child to exercise parental authority to force the child to visit with the parent.[160]

The parent's right to visit his child has been defined to mean "the right of the parent to go to see the child wherever he might be, and does not include the right of the parent to take possession of the child."[161] However, in *Skyanier v. Skyanier* the court used "right to visit" and "partial" custody synonomously even though partial custody includes the right of the parent to take the child away from home.[162] In *Skyanier* the parent who had been granted partial custody took the child to see the paternal grandparents and the grandparents were a disturbing influence on the child.[163] If the parent in this case had been granted only visitation rights rather than partial custody this adverse influence on the child could have been avoided because the visits to the grandparents could not have occurred.[164] The courts can possibly avoid in many cases the problem illustrated in *Skyanier* by specifying whether the parent granted visitation rights is allowed to have partial custody or has been granted only the right to visit with the child at the child's home. Courts feel that a better solution to the problem of visitation rights than a court imposed solution is stipulations by the parties as to the frequency and extent of visitation rights of the parent not receiving custody.[165]

With the right of visitation now extended to putative fathers it is submitted that most cases involving visitation rights of parents of legitimate children will now also be applicable to situations involving the right of the father to visit his illegitimate children.

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159. Commonwealth *ex rel.* Turner v. Strange, 179 Pa. Super. 83, 86, 115 A.2d 885, 886 (1955); Commonwealth *ex rel.* Brown v. Lane, 90 Pa. Super. 350, 352 (1927).

160. Commonwealth *ex rel.* Lotz v. Lotz, 188 Pa. Super. 241, 245, 146 A.2d 362, 364 (1958). The ruling in this case was based upon the welfare of the child criterion. The court felt that estrangement of the parent from his child should be avoided even if against the child's will.

161. Commonwealth *ex rel.* Rosequist v. Rosequist, 216 Pa. Super. 388, 391, 268 A.2d 140, 143 (1970).

162. 190. Pa. Super. 56, 151 A.2d 817 (1959).

163. *Id.*

164. *See* note 161 and accompanying text *supra* for the definition of right to visit. *See* note 162 and accompanying text *supra* for the definition of partial custody.

165. Commonwealth *ex rel.* McKee v. Reitz, 193 Pa. Super. 125, 131, 163 A.2d 908, 911 (1960).

In *Golembewski v. Stanley*[166] the superior court held that granting visitation rights to the putative father would be detrimental to the child's welfare because the child's illegitimacy would be emphasized by the father's visits.[167] The court's decision in *Commonwealth v. Rozanski*[168] was consistent with its holding in *Golembewski* that the criterion to be used in deciding whether a putative father should be granted visitation rights is the child's welfare, but overruled the *Golembewski* decision that granting a putative father visitation rights is *always* detrimental to the child's welfare.[169]

> To state as a matter of law that the visits of a putative father are always detrimental to the illegitimate child's best interests is to exalt rule over reality. This approach ignores the growing recognition in our courts and in courts throughout the nation, of the need to determine the welfare of each child in light of his own particular needs and circumstances.
>
> The putative father may, in many instances, instill in the child a sense of stability. He may develop qualities in the child which the mother is uninterested, unwilling, or incapable of developing. To the extent that he can perform such a valuable service, his presence becomes exceedingly important. Certainly, to the illegitimate child, the father who takes the time to visit is not putative.[170]

The mother's prejudices, or the possible adverse effect of the putative father's visits on the mother's future marital plans are unimportant factors because the child's welfare is determinative.[171] The fact that the child is illegitimate rather than legitimate also should be irrelevant today because of the *Rozanski* decision.

Another positive effect of allowing the putative father to visit his illegitimate child is that the father can evaluate how well his support payments are being utilized.[172] Because visitation rights are always temporary the rights may be withdrawn if the court feels the visits are detrimental to the child's welfare.[173]

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166. 205 Pa. Super. 101, 208 A.2d 49 (1965).
167. *Id.* at 104, 208 A.2d at 51.
168. 206 Pa. Super. 397, 213 A.2d 155 (1965).
169. *Id.* at 402, 213 A.2d at 156-57.
170. *Id.* at 402, 213 A.2d at 157. The finding of a sociological study, E.G. STRECKER, THEIR MOTHER'S SONS (1951) supports this court's view that a father's companionship can be beneficial to a male child. The study found that overexposure of a young boy to his mother may inhibit his development of masculine traits.
171. Commonwealth v. Rozanski, 206 Pa. Super. 397, 404, 213 A.2d 155, 158 (1965).
172. Baker v. Baker, 81 N.J. Eq. 135, 137, 85 A. 816, 817 (1913).
173. Commonwealth v. Rozanski, 206 Pa. Super. 397, 405, 213 A.2d 155, 158 (1965). The court also felt that if the mother marries and she and her new husband wish to adopt the child, then the visitation rights of the putative father could possibly be withdrawn, if the court feels withdrawal and adoption is in the best interest of the child.

V. ABORTION

A. *Present Law*

Recently in *Roe v. Wade*[174] the United States Supreme Court ruled that during the first trimester of a pregnancy the abortion decision is a matter to be decided by the woman and her doctor.[175] In discussing any possible rights the father of the fetus may have in the decision to terminate the pregnancy the Court stated that "[n]either in this opinion nor in *Doe v. Bolton*[176] do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision."[177]

A putative father of an unborn illegitimate child recently requested state aid to prevent a woman from having an abortion performed.[178] The putative father of the unborn child argued that he had a right to participate in the abortion decision but the Florida court in this case of first impression ruled for the woman.[179] The court felt any right the potential putative father may have in the fetus is "subservient to the health of the pregnant woman and potentiality of human life."[180] The court also dismissed as without merits the putative father's argument that by participating in the sex act the woman had waived her right to privacy including her right to an abortion, reasoning that the mother's right to an abortion was separate from the act of conception.[181]

The argument that by deciding to have an abortion performed the mother demonstrated her unfitness as a mother, and had abandoned the fetus were rejected by the court as questions of morality settled by the *Roe v. Wade* decision[182] and that regardless of whether the court felt these arguments had merit, these arguments must "yield to the paramount considerations of the preservation and protection of maternal health."[183]

The court in *Jones v. Smith*[184] took cognizance of *Stanley v. Illinois*[185] and the many articles[186] dealing with the expanding rights

174. 410 U.S. 113 (1973).
175. *Id.* at 163.
176. 410 U.S. 179 (1973).
177. Roe v. Wade, 410 U.S. 113, 165 n.67 (1973).
178. Jones v. Smith, 278 So. 2d 339 (Fla. App. 1973).
179. *Id.* at 340.
180. *Id.* at 341.
181. *Id.* at 342-43.
182. 410 U.S. 113, 163 (1973).
183. Jones v. Smith, 278 So. 2d 339, 343 (Fla. App. 1973).
184. 278 So. 2d 339, 343 (Fla. App. 1973).
185. 405 U.S. 645 (1972). The Court held that a putative father is entitled to a dependency hearing on his fitness as a parent before a state may

of the putative father, but was "unable to conclude that such expansion is sufficiently broad as to embrace any right to prevent termination of pregnancy."[187]

B. *Analysis*

The argument that *Stanley v. Illinois* vests in the putative father certain rights in his illegitimate child, which include the right to prevent an abortion, seems to be an ineffective argument despite Chief Justice Burger's dissenting prediction that the Court in *Stanley* had "embarked on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernable."[188] The *Stanley* decision did not hold that the putative father has a "fundamental right" in his illegitimate child but only held that a putative father was "entitled to a hearing on his fitness as a parent before his [illegitimate] children [can be] taken from him," and that denial of such a hearing is a violation of equal protection and due process.[189] However, a woman's right to choose whether to have an abortion performed has been held to be a fundamental right of privacy during the first trimester of a pregnancy.[190] Therefore, it seems that in order for the putative father to be able to invoke state aid to prevent an abortion he would have to convince the court that he has a fundamental right to protect the life of the fetus from the time of conception.[191] The probability seems remote that a court would hold that the father has such a right to prevent an abortion when the state, which is the legal guardian of all children, cannot prevent the abortion in the first trimester.[192] This improbability is even stronger in states which hold that the putative father is not even legally related to his ille-

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take custody of his illegitimate children upon the death of their mother. This case has been referred to in many articles as a possible precedent for greatly expanding the rights of putative fathers. *E.g.*, 61 ILL. B.J. (1973); 4 LOYOLA U. L.J. 176 (1973); 7 SUF. U. L. REV. 159 (1972); 21 DEPAUL L. REV. 1036 (1972); 34 U. PITT L. REV. 303 (1972).

186. *See* articles cited at note 12 *supra*.

187. Jones v. Smith, 278 So. 2d 339, 344 (Fla. App. 1973).

188. Stanley v. Illinois, 405 U.S. 445, 668 (1972) (dissenting opinion).

189. *Id.* at 649. The petitioner in Stanley was an unwed father who had lived intermittently for 18 years with a woman during which time they had three children. Upon the woman's death the three children became wards of the state. A dependency hearing was held which resulted in the children being placed with court-appointed guardians. The petitioner's fitness as a parent was not considered relevant by the court and therefore was not an issue at the hearing.

190. Roe v. Wade, 410 U.S. 113, 153 (1973).

191. To support this proposition the putative father of the unborn child could refer to: Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (parenthood is a property right protected by the fifth and fourteenth amendments); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation is a basic civil right of man); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (rights to conceive and raise one's children are essential rights).

192. Roe v. Wade, 410 U.S. 113 (1973).

gitimate child.[193] The chances seem stronger that a father of an unborn legitimate child may be granted a right to prevent an abortion because the father would be exercising his traditional role of protecting a member, at least a potential member, of the legal family unit. If the right to prevent an abortion is granted to the father of an unborn legitimate child then this right may be granted to the father of an unborn illegitimate child, if the classification of illegitimacy is ever held to be a "suspect classification."[194]

VI. ADOPTION

The law of adoption in Pennsylvania is entirely statutory[195] and in compliance with legislative intent the courts construe the adoption statutes strictly.[196]

Any individual can petition for the adoption of a child;[197] however, a parent cannot adopt his or her legitimate or legitimated child.[198] In adoption proceedings the best welfare of the child is considered to be controlling *only after* the statutory requirements to obtain all necessary consents have been met or the circumstances are such that no consent is required.[199]

If the mother has custody of the illegitimate child the only consent required in the adoption of the illegitimate child is the consent of the natural mother.[200] The natural mother may with-

193. PA. STAT. ANN. tit. 20, § 2107 (Supp. 1972) holds that an illegitimate child is the child of its mother but not of its father for purposes of descent.

194. *See* note 256 and accompanying text *infra* for a discussion of suspect classifications.

195. Ballard v. Ward, 89 Pa. 358, 362 (1879).

196. *In re* Adoption of Maisels, 395 Pa. 329, 332, 149 A.2d 38, 39 (1958). *But see In re* McQuiston's Adoption, 238 Pa. 304, 310, 86 A. 205, 207 (1913) which advocates a liberal construction of adoption statutes.

197. PA. STAT. ANN. tit. 20, § 202 (Supp. 1972). The proper court to handle an adoption proceeding is the court of common pleas in each county. PA. STAT. ANN. tit. 20, § 201 (Supp. 1972).

198. Adoption of Baltosser, 63 Pa. D. & C. 498, 500 (O.C. Perry 1949). Whether a father may adopt his illegitimate child is unanswered by this court.

For a discussion of an attempt by the mother of an illegitimate child to adopt her illegitimate child, *see* Vannini, *Application By a Mother To Adopt Her Illegitimate Child*, 12 CAN. B.J. 137 (1969).

199. PA. STAT. ANN. tit. 1, §§ 413, 414 (Supp. 1973) covers when consents are not required. *See also In re* Dougherty's Adoption, 358 Pa. 620, 623, 58 A.2d 77, 80 (1948); *In re* Schwab's Adoption, 355 Pa. 534, 537, 50 A.2d 504, 507-08 (1947).

200. PA. STAT. ANN. tit. 1, § 411(3) (Supp. 1973). Whether this statute's exclusion of the putative father from the class of persons whose con-

draw such consent at any time prior to or during the hearing upon the petition for adoption.[201] The omission of a requirement for the putative father's consent was intentional, not an oversight or mistake, because the clause in the repealed statute[202] requiring the consent of the putative father if he had acknowled the child was deleted from the new adoption statute.[203] The only situation in which the consent of the putative father is required is if the putative father has custody,[204] which is very seldom the case unless the mother is deceased. Because the consent of the putative father is not required he need not be given any notice that his illegitimate child is being adopted.[205] The putative father's relation to an adoption proceeding is succinctly stated by the Pennsylvania Supreme Court: "[I]n an adoption proceeding the putative father is not a party, is given no notice, is not named or described in the petition, and need not consent to the adoption or be proved to have abandoned the child."[206]

One key reason for not including the putative father in the adoption proceeding is to facilitate adoption of illegitimate children.[207] An alternative to the present complete exclusion of the putative father from the adoption proceeding would be to give the putative father notice of the adoption proceeding and allow him to be heard prior to the proceeding. Then the judge could decide, on the basis of the welfare of the child, whether to give the putative father custody of the illegitimate child, or to allow the adoption to proceed. This proceedure would add no uncer-

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sent is required for the adoption of an illegitimate child is a valid exclusion in light of Stanley v. Illinois, 405 U.S. 645 (1972) and Pennsylvania's Equal Rights Amendment, PA. CONST. art. I, § 27, is discussed in notes 250-266 and 270-274 and accompanying text *infra*.

201. *In re* Adoption of Stone, 398 Pa. 190, 194, 156 A.2d 808, 810 (1960).

202. Act of June 30, 1917, P.L. 1180, § 2 [1947] (repealed 1971). However, the consent of the father of a legitimate child is required before that child may be adopted. PA. STAT. ANN. tit. 1, § 2 (Supp. 1973).

203. PA. STAT. ANN. tit. 1, § 411 (Supp. 1973).

204. PA. STAT. ANN. tit. 1, § 411(5) (Supp. 1973).

205. *In re* Brennan, 270 Minn. 455, 134 N.W. 126, 130 (1965). Although this is a Minnesota court's holding it is apparent from PA. STAT. ANN. tit. 1, § 2 (Supp. 1973) that the Pennsylvania Legislature's intent is to exclude the father of an illegitimate child from the adoption proceeding so the father is probably not required to be given notice in Pennsylvania either. In one Pennsylvania case, Swartwood's Adoption, 19 Pa. Dist. 819 (Wyoming 1909), the court held that the putative father was entitled to notice but this holding is probably invalid today due to PA. STAT. ANN. tit. 1, § 2 (Supp. 1973). For a discussion of a putative father's right to notice, *see* 68 U. ILL. L.F. 232 (1968).

206. *In re* Adoption of Wischmann, 428 Pa. 327, 330, 237 A.2d 205, 207 (1968). Although this case was decided prior to the new adoption law its assessment of the father's role in the adoption proceeding is still valid today.

207. *In re* Brennan, 270 Minn. 455, 134 N.W.2d 126, 131 (1965). However, if the putative father marries the mother then his consent is required if the decree terminating the mother's parental rights was issued after the marriage. PA. STAT. ANN. tit. 1, § 411(3) (Supp. 1973).

tainty to adoption proceedings because it could be done after the mother has agreed to allow her child to be adopted, yet prior to any selection of the prospective adopting parents. Failure of the father to appear would be a waiver by him of any further interest in the child. The putative father's consent would still not be required, but notice to him would be required, and a right to be heard would be granted.[208]

The mother of an illegitimate child may petition the court to relinquish all her parental rights in the illegitimate child to an agency,[209] or to an adult intending to adopt the child.[210] This relinquishment is final and once the decree is entered, the mother's consent for adoption is no longer required.[211] The relinquishment is held to be irrevocable in order to achieve finality and to sever the ties between the natural mother and her child in order to give more stability to the adoption process.[212]

The natural mother's parental rights in her illegitimate child may also be involuntarily terminated on the ground that her conduct for at least six months evidenced a settled purpose to relinquish parental claims to her child, or a failure to perform parental duties, or a repeated and continued incapacity to provide the child with parental care.[213]

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208. Alternative approaches to the question of whether the putative father's consent should be required have been adopted in other states. Consent of the father of an illegitimate child is required by the following statutes if paternity has been established: ALA. CODE tit. 27, § 3 (1958); ORE. REV. STAT. § 109.080 (1971).

If paternity has been established or the father has acknowledged the illegitimate child prior to the adoption proceeding the consent of the father is required. ARIZ. REV. STAT. ANN. § 8-106 (Supp. 1973). If the father's consent is required then personal notice must be given to the father. ARIZ. REV. STAT. ANN. § 8-111 (Supp. 1973).

One statute requires the father's consent if paternity has been judicially established, the father has contributed to the support of the child and the father's address is known or can be ascertained by expenditure of not more than five dollars. IND. ANN. STAT. § 3-120 (Supp. 1973).

209. PA. STAT. ANN. tit. 1, § 301 (Supp. 1973).

210. PA. STAT. ANN. tit. 1, § 302 (Supp. 1973).

211. PA. STAT. ANN. tit. 1, § 414 (Supp. 1973). After the parent's consent is no longer required the welfare of the child becomes the court's guiding factor. Davies Adoption Case, 353 Pa. 579, 587, 46 A.2d 252, 256 (1959).

212. *In re* Watson, 450 Pa. 579, 584, 301 A.2d 861, 864 (1973).

213. PA. STAT. ANN. tit. 1, § 311 (Supp. 1973). To guard against the possibility of a court decision holding that a putative father's consent is required in the adoption proceeding the attorney for the adopting parents can include the language of this statute in the adoption proceeding documents and request that the court make a ruling that the putative father has relinquished his parental rights.

Cases prior to the passage of this statute had attempted to determine

The parent-child relationship is not disturbed by an involuntary termination of parental rights unless the abuse by the parent is continued abuse, not a single act of abuse.[214] The petition to terminate parental rights in an illegitimate child, may be brought by an agency, or the person having custody of the child[215] but not by the putative father, unless he is also the person having custody.[216]

VII. Inheritance and Recovery Under Statutes

"For purposes of descent by, from and through a person born out of wedlock, he shall be considered the child of his mother but not of his father."[217] Thus the legislature has explicitly manifested its intent not to allow illegitimate children and their father to inherit from or through each other.[218] However, if the illegitimate child's parents marry subsequent to his birth then he is legitimated for the purposes of descent and inherits equally with any other legitimate child of his parents.[219] Acknowledgment of the illegiti-

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if the parent had evidenced a settled intent to relinquish parental rights forever and had determined certain actions which did evidence such an intent and certain actions which did not evidence such an intent. A parent's consent to adoption does not evidence such an intent unless other factors are also present which demonstrate a settled intent. *In re* Adoption of Stone, 398 Pa. 190, 194, 156 A.2d 808, 810 (1960). Temporarily leaving the child with a third party for the welfare of the child does not evidence a settled intent. Wanner v. Williams, 117 Pa. Super. 59, 61, 177 A. 329, 330 (1935). Leaving the child with a hospital and signing a surrender statement does evidence a settled intent. *In re* McCann's Adoption, 104 Pa. Super. 196, 210, 159 A. 334, 339 (1932). Failure to support the child is evidence of such a settled intent but is not determinative without other evidence. *In re* Adoption of Underwood, 31 West L.J. 171, 173 (Pa. O.C. 1950).

214. Jones Appeal, 449 Pa. 543, 547, 297 A.2d 117, 119 (1972). In this case the single act of abuse by the mother was aiding in the rape of her fourteen year old daughter, yet the court refused to involuntarily terminate her parental rights in her seven children because the abuse was not "continued." For other cases where the courts interpret and utilize Pa. Stat. Ann. tit. 1, § 311 (Supp. 1973), see Loar Adoption, 56 Pa. D. & C.2d 618 (C.P. Mercer 1972); Casteel Adoption, 55 Pa. D. & C.2d 307 (C.P. Fay. 1972).

215. Pa. Stat. Ann. tit. 1, § 312 (Supp. 1973).

216. Pa. Stat. Ann. tit. 1, § 312 (Supp. 1973).

217. Pa. Stat. Ann. tit. 20, § 2107 (Supp. 1972). In Labine v. Vincent, 401 U.S. 532 (1971), the Court held that state intestacy laws which differentiate between a father's legitimate and illegitimate children are constitutionally valid because such statutory classifications have a rational relation to a valid state interest. For an excellent discussion of Labine v. Vincent *see* Petrillo, *Labine v. Vincent: Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 Dick. L. Rev. 377 (1971).

218. Manfredi's Estate, 399 Pa. 285, 291, 159 A.2d 697, 700 (1960); Wharton's Estate, 218 Pa. 296, 297, 67 A. 414, 415 (1907). At common law the illegitimate child and its father could not inherit from or through each other either. McGunnicle v. McKee, 77 Pa. 81, 84 (1875).

219. Pa. Stat. Ann. tit. 20, § 2107 (Supp. 1972). Notice in this statute that there is no requirement for cohabitation as there was in Pa. Stat. Ann. tit. 48, § 167 (Supp. 1973) which deals with legitimation.

mate child by the father is not sufficient to allow the illegitimate child to inherit from the father if the father dies intestate.[220] If a devise is made to a man's "children" in a will[221] or in a conveyance[222] the word "children" does not include illegitimate children. This construction of the word "children" is adhered to by the courts, even if it thwarts the testator's intent, in order to further the general policy of the law toward illegitimates.[223]

Illegitimate children inherit through descent from their mother equally with her legitimate children.[224] The courts of Pennsylvania have held in the past that illegitimate children could inherit *from* their mother but not *through* their mother from a third person.[225] However, the present statutes[226] contain no such restriction. Illegitimates have not always had capacity to inherit from other illegitimate children born of the same mother but today they do have such capacity.[227] Because the illegitimate child

220. Mann's Estate, 24 Leh. L.J. 261, 264 (Pa. O.C. 1951). In California an illegitimate child can inherit from its father as an heir if the father acknowledges the child in writing. CAL. PROB. CODE § 255 (West Supp. 1973).

221. PA. STAT. ANN. tit. 20, § 2514 (Supp. 1972).

222. PA. STAT. ANN. tit. 20, § 6114 (Supp. 1972). However, if the devise is to a woman's children her illegitimate children take equally with her legitimate children. PA. STAT. ANN. tit. 20, § 2107 (Supp. 1972).

223. *In re* Schriver's Estate, 159 Pa. Super. 314, 317, 48 A.2d 52, 53 (1946).

224. PA. STAT. ANN. tit. 20, § 2107 (Supp. 1972). As early as 1855 Pennsylvania held by statute that an illegitimate child and its mother had the capacity to inherit from each other. Act of April 27, 1855, P.L. 368, § 3 [1855] (repealed 1917).

225. *In re* Ree's Estate, 166 Pa. 498, 499, 31 A. 254, 254-55 (1895); Appeal of Grubb, 58 Pa. 55, 63 (1868).

226. PA. STAT. ANN. tit. 20, § 2107 (Supp. 1972), *see* note 217 and accompanying text *supra*; PA. STAT. ANN. tit. 20, § 2514 (Supp. 1972), *see* note 221 and accompanying text *supra*; PA. STAT. ANN. tit. 20, § 6114 (Supp. 1972), *see* note 222 and accompanying text *supra*.

The illegitimate gradually through statute was given capacity to inherit from its natural mother on an equal basis with the mother's legitimate children. In 1897 the illegitimate child, natural mother, and maternal grandmother were given the capacity to inherit from each other as heirs. Act of June 14, 1897, P.L. 142, § 1 [1897] (repealed 1917). The illegitimate's capacity to inherit was extended to include maternal ancestors in 1917. Act of June 7, 1917, P.L. 429, § 15 [1917] (repealed 1947).

The illegitimate can inherit from his mother equally with legitimate children with no legal obstacles. Thompson v. Delaware, I. & W. R.R. Co., 41 Pa. Super. 617, 625 (1910).

227. Because PA. STAT. ANN. tit. 20, § 2107 (Supp. 1972) makes illegitimate children the children of their mother for purposes of inheritance illegitimate children may inherit from each other as brother and sister. The Act of June 5, 1883, P.L. 88, § 1 [1883] (repealed 1917) gave illegitimate children the capacity to inherit personal property from each other and the Act of June 14, 1897, P.L. 142, § 1 [1897] (repealed 1917) extended this capacity to include realty.

has a duty to support his mother,[228] the illegitimate is the child of the mother for purposes of inheritance,[229] and the mother has a prima facie right to custody of her illegitimate child, it can be inferred that the mother of an illegitimate child has a right to his earnings and services.[230]

Children are entitled to recover damages for the wrongful death of a parent in the same "proportion they would take his or her personal estate in case of intestacy."[231] Pennsylvania courts have held that illegitimate children could not recover for the wrongful death of a parent,[232] but in *Levy v. Louisiana*[233] the United States Supreme Court held that an illegitimate child could not be barred by a state statute from recovering damages for the wrongful death of his mother based on the classification of illegitimacy. *Levy* thus allows illegitimate chillren to recover damages for the wrongful death of their *mother* in Pennsylvania. However, whether illegitimates now have a right to recover damages for the wrongful death of their father in Pennsylvania is unclear in light of the statute's language[234] and the decision of the United States Supreme Court in *Labine v. Vincent*[235] which clarified the *Levy* decision. In Pennsylvania illegitimate children possibly cannot recover damages for the wrongful death of their father because wrongful death recovery is limited by the intestacy statute[236] and under this statute illegitimates inherit nothing from their father. Because differentiation between illegitimates and legitimates in state intestacy statutes is valid[237] denial of wrongful death damages to illegitimates in Pennsylvania for the death of their father will be held to be valid or invalid on the basis of whether the courts feel utilization of an intestacy statute is a proper method of determining recovery of wrongful death benefits in light of *Levy*.[238] In order to rectify this possible denial of

228. Commonwealth v. Gross, 35 York 93, 94 (Pa. Q.S. 1921).

229. PA. STAT. ANN. tit. 20, § 2107 (Supp. 1972).

230. California gives the mother of an illegitimate this right by statute. CAL. CIV. CODE § 200 (West 1954).

231. PA. STAT. ANN. tit. 12, § 1602 (1953).

232. Bullock v. Sinclair Refining Co., 160 F. Supp. 300, 302 (E.D. Pa. 1958); Molz v. Hansell, 115 Pa. Super. 338, 342, 175 A. 880, 881 (1934).

233. 391 U.S. 68 (1968). In Glona v. Am. Guar. and Liab. Ins. Co., 391 U.S. 73 (1968) the court held that the mother could not be barred by a state statute from recovering damages for the wrongful death of her illegitimate child. *Levy* and *Glona* are discussed in Hood, *Another Look at Levy and Glona*, 19 LA. B.J. 135 (1971).

234. *See* note 231 and accompanying text *supra*.

235. 401 U.S. 532 (1971). For a discussion of this decision and its significance *see* note 217 and accompanying text *supra*.

236. PA. STAT. ANN. tit. 20, § 2107 (Supp. 1972). This statute is discussed in note 217 and accompanying text *supra*.

237. Labine v. Vincent, 401 U.S. 532 (1971). *See* note 217 and accompanying text *supra*.

238. The court in Labine v. Vincent, 401 U.S. 532, 536 (1971) stated that "*Levy* did not say and cannot fairly be read to say that a state can never treat an illegitimate child differently from legitimate offspring."

recovery the Pennsylvania Legislature could amend the present statute[239] to enable illegitimates to recover wrongful death damages due to the wrongful death of their father.[240]

The children of a deceased father are entitled to a portion of the payments of Workmen's Compensation benefits.[241] However, Pennsylvania courts have excluded illegitimate children from the classification of "children" and illegitimate children may only receive benefits if they were a member of the father's household at the time of his death and the father stood in *loco parentis* to the illegitimate child.[242] A legitimate child is entitled to Workmen's Compensation benefits because of his status and there is no need to show that the legitimate child was dependent on the father.[243] However, the United States Supreme Court recently held that it was a violation of the equal protection clause of the fourteenth amendment to deny Workmen's Compensation benefits to an illegitimate child based on the classification of illegitimacy.[244] The Court in *Weber v. Aetna Casualty and Surety Company*,[245] however, held that a state could validly distinguish between children based upon their dependency on the father. The Pennsylvania scheme of excluding the illegitimate child unless he meets two requirements[246] yet allowing the legitimate child to recover based merely upon his status seems violative of the decision in *Weber*. The statute[247] need not be changed in order to comply with the *Weber* decision because the word "child" is used in the statute without restricting it to mean only legitimate children. The courts need only change their judicial construction of the word "child" to include both legitimate and illegitimate children. Then the courts can constitu-

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239. PA. STAT. ANN. tit. 12, § 1602 (1953).

240. The court in Frazier v. Oil Chemical Co., 407 Pa. 78, 89, 179 A.2d 202, 208 (1962) makes an indirect appeal to the legislature to make such a change but none has been made by the legislature. The issue of whether an illegitimate child should recover for the wrongful death of his father is discussed in 24 U. FLA. L. REV. 190 (1971).

241. PA. STAT. ANN. tit. 77, § 562 (Supp. 1973).

242. Frazier v. Oil Chemical Co., 407 Pa. 78, 85, 179 A.2d 202, 206 (1962); Cairgle v. Am. Radiator and Standard Sanitary Corp., 366 Pa. 249, 255, 77 A.2d 439, 442 (1951); Balanti v. Stineman Coal and Coke Co., 131 Pa. Super. 344, 346, 200 A. 236, 237 (1938). For a discussion of the rights of illegitimates under federal statutes, see Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

243. Mohan v. Publicker Industries, Inc., 202 Pa. Super. 581, 583, 198 A.2d 326, 327 (1964).

244. Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164 (1972).

245. *Id.*

246. Frazier v. Oil Chemical Co., 407 Pa. 78, 85, 179 A.2d 202, 206 (1962).

247. PA. STAT. ANN. tit. 77, § 562 (Supp. 1973).

tionally exclude children using a test of dependency as long as the test is applied similarly to both legitimate and illegitimate children. If an illegitimate child is included in the meaning of the word "child" in the statute, illegitimate children could receive Workmen's Compensation benefits without being required to meet the burden of proof presently required by Pennsylvania courts.[248] The court in *Weber* stated that posthumous illegitimate children also cannot be excluded due to the fact that they are illegitimate if posthumous legitimate children are included within the statute's coverage.[249]

IX. Effect of The Equal Protection Clause

The effect of the equal protection clause and the due process clause of the fourteenth amendment upon the area of the law dealing with the rights, duties and liabilities of the illegitimate child, natural mother and putative father has been extensively covered in other articles.[250] Therefore, the coverage of it in this article will be condensed with the emphasis on the equal protection clause's possible effect on certain segments of Pennsylvania law.

In deciding if a statutory classification violates the equal protection clause the court will use either of two tests. The most frequently used test, the "rational relation" test,[251] requires that the classification must "bear some rational relationship to a legitimate state purpose"[252] and be "founded upon reason and logic."[253] Reducing the caseload of the courts and expediting litigation by eliminating hearings on the merits have been held to be proper state interests but are subordinate to an individual's right to equal protection of the law.[254] The rational relation test does not subject a state statute to an extremely strict scrutiny and the Pennsylvania statutes relating to illegitimates covered previously in this article could probably pass the rational relation test.[255]

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248. *See* note 242 and accompanying text *supra* for coverage of these requirements. These requirements would not be needed because illegitimates would be included within the scope of Pa. Stat. Ann. tit. 77, § 562 (Supp. 1973) by their inclusion in the classification "child" without any need to use the present requirements.

249. Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164, 169 n.7 (1972).

250. *See* note 3 *supra.*

251. The rational relation test was used in the following cases: Roe v. Wade, 410 U.S. 113 (1973) (dissenting opinion) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (distribution of contraceptives); Glona v. American Guar. and Liab. Ins. Co., 391 U.S. 73 (1968) (wrongful death); Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death); Robinson v. California, 370 U.S. 660 (1962) (drug addict).

252. Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164, 172 (1972).

253. Commonwealth *ex rel.* Sullivan v. Ashe, 325 Pa. 305, 307, 188 A. 841, 842 (1937).

254. Stanley v. Illinois, 405 U.S. 645, 656 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971).

255. Schafrick *Emerging Constitutional Protection of the Putative Father's Parental Rights*, 7 Fam. L.Q. 75 (1973). Current state laws have

A stricter test, the "compelling state interest" test, is used by courts whenever the classification is "suspect"[256] or if a "fundamental right"[257] is involved. If this test is used the state must establish that there is a "compelling state interest" for imposing the classification.[258] The classifications of illegitimates and parents of illegitimates have not been declared suspect classifications.[259] The interest of the father in his illegitimate child has been held to warrant deference and protection unless there is a "powerful countervailing interest,"[260] but has not been deemed a fundamental right. The right of a child to receive support from his father has been held to be "essential"[261] but not "fundamental." If the classifications of illegitimate children, parents of illegitimate children and classifications based upon sex were held to be "suspect" the mandatory use of the "compelling state interest" test would probably result in a ruling that the sections of Pennsylvania law relating to illegitimacy based upon these classifications are violative of the equal protection clause of the fourteenth amendment and are thus unconstitutional.[262]

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a conceivable basis supporting them and would pass the rational relation test. *Id.* at 83.

256. McLaughlin v. Florida, 379 U.S. 184 (1964) (race is a suspect classification); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (race is a suspect classification); Oyama v. California, 332 U.S. 663 (1940) (ancestry is a suspect classification).

257. Griswald v. Connecticut, 381 U.S. 479 (1965) (marital privacy is fundamental right); Reynolds v. Sims, 377 U.S. 533 (1964) (voting is a fundamental right).

258. Roe v. Wade, 410 U.S. 113 (1973). "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155.

259. For a discussion of the possibility of sex being held to be a suspect classification see notes 265-274 and accompanying text *infra.*

In Frontiero v. Richardson, 411 U.S. 677 (1973) four justices held that sex is a suspect classification. However due to the fact that a majority of the Supreme Court did not hold sex to be inherently suspect, this decision is not a binding precedent for the courts at this time.

260. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

261. Gomez v. Perez, 409 U.S. 535 (1973). A child's right to a familial relationship with his father has been advocated as a fundamental right. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967). The courts have not yet agreed with this author.

262. Schafrick, *Emerging Constitutional Protection of the Putative Father's Parental Rights*, 7 FAM. L.Q. 75 (1973). Almost every classification can meet the rational relation test; few can withstand the strict scrutiny of the compelling state interest standard. *Id.* at 83.

However, in Marcus, *Equal Protection: Custody of the Illegitimate Child*, 11 J. FAM. L. 1, 39 (1971) the author feels that the classification of parents of illegitimates could withstand even the "compelling state interest" test.

Parenthood of a legitimate child has been held to be a property right protected by the due process clause of the fourteenth amendment.[263] Therefore, if the classification as parent of an illegitimate is ruled invalid, then a putative father's right of parenthood would probably be held to be violated by Pennsylvania's exclusion of him from the adoption proceeding involving his illegitimate child.[264]

X. Effect of the Pennsylvania Equal Rights Amendment

The Pennsylvania Legislature recently enacted an Equal Rights Amendment to the Pennsylvania Constitution which reads: "Prohibition against denial or abridgment of equality of rights because of sex. Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."[265] Through this amendment the Pennsylvania Legislature made sex an "impermissible classification" upon which rights cannot be "arbitrarily and capriciously" denied.[266] Courts have relied upon this amendment to declare as unconstitutional Pennsylvania's divorce from bed and board statute,[267] the granting of recovery for loss of consortium to the husband but not the wife[268] and the granting of the right to receive costs *pendente lite* only to the wife.[269]

The test to use in determining whether rights are being granted or restricted in violation of the Equal Rights Amendment is whether the rights are granted exclusively to one sex with no mutuality of rights to both sexes.[270] There is no exception for domestic relations made in the amendment[271] so the amendment will apply to all areas of the law pertaining to illegitimacy in Pennsylvania. The

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263. Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

264. In Stanley v. Illinois, 405 U.S. 645 (1972) the Court held that a putative father's right to due process of law had been violated by the state's failure to grant him a hearing on his fitness as a parent before the state took custody of his illegitimate children.

265. Pa. Const. art. I, § 27. Compare the Pennsylvania Equal Rights Amendment with the language of Section 1, Proposed Equal Rights Amendment to the U.S. Constitution, H. R.J. Res. 208, 92nd Cong., 1st Sess. (1971); S.J. Res. 8, 92nd Cong., 1st Sess. (1971) which states: Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

266. Lukens v. Lukens, 224 Pa. Super. 227, 229, 303 A.2d 522, 523 (1973); Corso v. Corso, 120 Pitt L.J. 183 (Pa. C.P. 1972). The basic principle of the Pennsylvania Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. *Id.* at 194.

267. Kehl v. Kehl, 57 Pa. D. & C.2d 164 (C.P. Alleg. 1972).

268. Hopkins v. Blanco, 224 Pa. Super. 116, 302 A.2d 855 (1973).

269. Wiegand v. Wiegand, 226 Pa. Super. 278, 310 A.2d 426 (1973).

270. *Id.* This test can be referred to as the "exclusiveness" or "mutuality of rights" test.

271. *Id.*; Henderson v. Henderson, 224 Pa. Super. 182, 303 A.2d 843, 846 (1973) (dissenting opinion).

prima facie right of the mother to custody of her illegitimate child seems very likely to be held to be in violation of the Equal Rights Amendment.[272] Other areas where the Equal Rights Amendment may have a profound effect are Pennsylvania's exclusion of the putative father from his illegitimate child's adoption proceeding and Pennsylvania's holding that the illegitimate child is the child of the mother but not the father for inheritance purposes.[273] If the Pennsylvania Supreme Court adopts a test for determining violations of the Pennsylvania Equal Rights Amendment which is less rigorous than the test in *Wiegand v. Wiegand*[274] and similar to the equal protection tests used in cases where the fourteenth amendment is involved, it seems that the Pennsylvania Legislature's passage of the Equal Rights Amendment at the very least expresses legislative intent to make sex a "suspect classification" requiring the use of the more rigorous "compelling state interest" test. What the actual effect of the Pennsylvania Equal Rights Amendment will be in the area of illegitimacy, however, remains to be seen.

CONCLUSION

This article has dealt with the rights, duties and liabilities of the illegitimate child, the natural mother, and the putative father in Pennsylvania. Society has long burdened the illegitimate with legal liabilities for the stated purpose of encouraging marriage and legitimacy. However, it is submitted that the time has arrived for Pennsylvania courts and the Pennsylvania Legislature to reject this relegation of the illegitimate to a legally inferior position in our society. Punishing the illegitimate child can easily be recognized as an ineffective method of preventing illegitimacy by deterring the natural father and mother from participating in the sex act. By adopting some or all of the changes discussed in this arti-

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272. Brown, Emberson, Falk and Freedman, *Equal Rights Amendment: A Constitutional Basis For Equal Rights For Women*, 80 YALE L.J. 871, 953 (1971). The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent.

> [T]he fact that in our present society members of one sex are more likely to be found in a particular activity or to perform a particular function does not allow the law to fix legal rights by virtue of a membership in that sex. *In short, sex is a prohibited classification.*

Id. at 889.

273. For a discussion of the possible effect of the Equal Rights Amendment on the support law in Pennsylvania see Comment, *The Support Law and the Equal Rights Amendment in Pennsylvania*, 77 DICK. L. REV. 254 (1973).

274. 226 Pa. Super. 278, 310 A.2d 426 (1973).

cle the Commonwealth of Pennsylvania can demonstrate its realization of the fact that the prejudicial treatment of the illegitimate in our society is an anachronism in our law which has no place in a society where acceptance of an individual should be based upon what qualities the person possesses, not upon an artificial status given him at birth.

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